United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

76-6044

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P/S

United States Court of Appeals

For the Second Circuit.

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH, and WILLIAM BARTH individually,

Plaintiffs-Appellants,

against

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

UNITED STATES COURT OF APPEALS
FILED
APR 14 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

HARRY M. LIPSIG, P. C.
Attorney for Plaintiffs-Appellants
100 Church Street
New York, N. Y. 10007
(212) 732-9000

DAVID G. TRAGER
United States Attorney, Eastern District of New York, Attorney for Defendant-Appellee
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Brooklyn, N. Y. 11201

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

(8721)

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH, and WILLIAM BARTH, individually,

Plaintiffs-Appellants,

-against-

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

- -X

DOCKET ENTRIES
(74C-74).

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED I EMOLUMEN RETURNS	
1-15-74	Complaint filed. Summons issued.	1	J:
1-18-74	Summons returned & filed./Executed.	2	
3/12/74	By JUDD,J.- Order dated 3/12/74 filed that the time for the deft to answer the complaint is extended to 4/15/74	3	
4/11/74	ANSWER of deft U.S.A. filed.	4	
6-26-74	Notice to take deposition of Victor Van Behrend filed.	5	
7-30-74	Deft's interrogatories to pltff filed in 74C-852.	---	
9/13/74	Before PLATT,J.- Case called- Conference held -All depositions to be completed by 12/6/74-2nd Conference scheduled for 12/6/74		
12-6-74	Before PLATT, J. - Case called & adj'd to 12-13-74 for status report.		
12/13/74	Before PLATT,J.- Case called- Adjd to 1/17/75		
1-3-75	Verified answer to interrogatories filed. (see document #4 on 74C 852)		
1/17/75	Before PLATT,J.- Case called- adjd to 2/7/75 for pre-trial conf.		

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DOCKET ENTRIES
(74C-74)

2-7-75	Before PLATT, J.- Case called & adj'd to 3-7-75.	
2/11/75	Notice to take deposition upon oral examinations filed.	6&9
[illegible]		
3/7/75	Before PLATT,J.- Case called- Adjd to 4/18/75	
4-18-75	Before PLATT, J.-Case called. Ready and passed.	
4-25-75	Deft's preliminary trial memorandum of law filed.	10
6-4-75	Trial Memorandum filed.	11
6-23-75	Memorandum of Law filed.	12
8-27-75	Before PLATT, J. - Case called. Trial ordered & begun. Trial continued to 8-28-75.	
8-28-75	Before PLATT, J-Case called. Trial resumed. Trial concluded decision reserved. All papers by 9-25-75.	
9-3-75	Stenographer's transcripts of Aug. 27 & 28, 1975 filed.	13/14
9-12-75	Notice of motion and memorandum of law for an order re negligence, ret 9-22-75 filed in 74C-852.	---
9-19-75	Pltff's findings of fact & conclusion of law filed.	15/16
9-23-75	Memorandum of points and authorities in opposition to pltffs' motion for an order determining that the law of comparative negligence applies herein filed.	17
9-25-75	Deft's post-trial memorandum of law filed.	18
9/26/75	Before PLATT,J.-Case called-motion of 9/23/75 denied	
11-11-75	By PLATT,J.-OPINION & ORDER that judgment must be entered in favof of the deft. the USA filed. (mg)	19
12-10-75	JUDGMENT dtd 12-10-75 dismissing the complaint filed. (mg)	20
12-10-75	NOTICE OF APPEAL FILED. Copy mailed to C of A w/copy of docket entries. (mg)	2
12-10-75	Undertaking for costs on appeal filed. (mg)	2
1-27-76	Certified copy of judgment from C of A dismissing the appeal filed. (mg)	2

DOCKET ENTRIES
(74C-74)

2-27-76	Certified copy of judgment from C of A reinstating the appeal filed.	24
3-5-76	Civil appeal scheduling letter dtd. 3-4-76 from C of A filed.	25
3-10-76	Above record certified & mailed to C of A.	--
3-15-76	Acknowledgment rec'd from C of A re receipt of file.	26
3/23/76	Unsigned stipulated pre-trial order filed	27
3-23-76	Doc. # 27 certified & mailed to C of A with papers in 74 C 852.	---
	A TRUE COPY	
	~~LEWIS ORF~~	
	BY	

DOCKET ENTRIES
(4C-852).

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
6-5-74	Complaint filed. Summons issued.	1	J.
6-11-74	Summons returned and filed/executed.	2	
6-26-74	Notice to take deposition of Victor Van Behrend filed in 74C74	---	
7-30-74	Deft's interrogatories to pltff filed.	3	
1-3-75	Verified answer to interrogatories filed.	4	
2/11/75	Notice to take depositions upon oral examinations filed		
	Filed in 74 C 74	--	
6-23-75	Memorandum of Law filed. See 74C74.	--	
9-12-75	Notice of motion and memorandum of law for an order directing		
	that the issue of liability regarding negligence & contributory		
	negligence be determined on a basis of comparative negligence,		
	ret 9-22-75 at 10 A.M. filed.	5/6	
3-23-76	Above record certified & mailed to C of A . As related	--	
	to 74 C 74		
	TRUE COPY [illegible] March 23, 19[illegible]		
	LEWIS ORGEL, Clerk		
	By [illegible] DEPUTY CLERK		

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH and WILLIAM BARTH, individually

Plaintiffs,

COMPLAINT

-against-

THE UNITED STATES OF AMERICA

Defendant.

----------x

Plaintiffs by their attorney:

FIRST CAUSE

1. This action is brought under the Federal Tort Claims Act 28 U.S.C. Sections 1346(b), 2671, et seq., as hereinafter more fully appears. Plaintiff is a citizen of the U.S.A.

2. Infant plaintiff, DEBORAH BARTH resided and still resides with her father, WILLIAM BARTH, at 676 Pat Drive, West Islip, New York.

PARAGRAPHS 3 THRU 18 ARE AT ALL TIMES HEREINAFTER MENDIONED UPON INFORMATION AND BELIEF

3. On June 24, 1972, defendant U.S.A. owned, operated and maintained the premises known as and located at the western end of Robert Moses State Park, an area more specifically known as Democrat Point.

4. On June 24, 1972, the U.S. Coast Guard of the Department of Transportation, an agency of the U.S.A. owned, operated and maintained the premises known as and located at the western end of Robert Moses State Park, an area more specifically known as Democrat Point.

COMPLAINT

5. On June 24, 1972, defendant U.S.A. owned, operated and maintained a tower located at the western end of Robert Moses State Park in the State of New York, an area of said park more specifically known as Democrat Point.

6. On June 24, 1972, the U.S. Coast Guard of the Department of Transportation, an agency of tne U.S.A. owned, operated and maintained a tower located at the western end of Robert Moses State Park in the State of New York, an area of said park more specifically known as Democrat Point.

7. Defendant U.S.A. was negligent in the ownership, operation, control and maintenance of said premises and was further negligent in the inspection thereof and was further negligent in the giving of any warning to users when it knew, or in the exercise of reasonable care should have known that said premises were dangerous and hazardous and constituted a nuisance and a trap; in failing to keep said premises in good repair; in failing to warn the infant plaintiff of the conditions prevailing thereat; in permitting the accident to happen and in otherwise being careless, reckless and negligent.

8. Defendant U.S. Coast Guard of the Department of Transportation was negligent in the ownership, operation, control and maintenance of said premises and was further negligent in the inspection thereof and was further negligent in the giving of any warning to users when it knew, or in the exercise of reasonable care should have known that said premises were dangerous and hazardous and constituted a

COMPLAINT

nuisance and a trap; in failing to keep said premises in good repair; in failing to warn the infant plaintiff of the conditions prevailing thereat; in permitting the accident to happen and in otherwise being careless, reckless and negligent.

9. Defendant U.S.A. was negligent in the ownership, operation control and maintenance of said tower located on the aforementioned premises, and was further negligent in the inspection thereof and was further negligent in the giving of any warning to users when it knew, or in the exercise of reasonable care should have known that said towers were dangerous and hazardous and constituted a nuisance and a trap; in failing to keep said towers in good repair, in failing to warn the infant plaintiff of the conditions prevailing thereat; in permitting the accident to happen and in otherwise being careless, reckless and negligent.

10. Defendant U.S. Coast Guard of the Department of Transportation was negligent in the ownership, operation, control and maintenance of said tower located on the aforementioned premises, and was further negligent in the inspection thereof and was further negligent in the giving of any warning to users when it knew, or in the exercise of reasonable care should have known that said towers were dangerous and hazardous and constituted a nuisance and a trap; in failing to keep said towers in good repair, in failing to warn the infant plaintiff of the conditions prevailing thereat; in permitting the accident to happen and in otherwise being careless, reckless and negligent.

11. By reason of the foregoing, infant plaintiff was seriously injured.

COMPLAINT

12. By reason of the foregoing, infant plaintiff was injured.

13. Plaintiff, DEBORAH BARTH, in no way contributed to said injuries and same were due solely to the carelessness and negligence of the defendants.

14. By reason of the foregoing, the infant plaintiff was severely and seriously injured, bruised and wounded, suffered and still suffers and will continue to suffer for some time to come great physical and mental and great bodily injuries and became sick, sore and disabled and so remains, some of which injuries plaintiffs are informed and verily believe are permanent in their nature.

15. By reason of the foregoing, the infant plaintiff was confined to hospital, bed and home for a considerable length of time.

SECOND CAUSE

16. Plaintiff, WILLIAM BARTH, was and still is the father of the infant plaintiff, DEBORAH BARTH, and as such is entitled to his services.

17. By reason of the foregoing, plaintiff WILLIAM BARTH has necessarily paid and has become liable to pay for medical aid and attendance, and for medicines, and plaintiff WILLIAM BARTH will necessarily incur further expenses of a similar character.

COMPLAINT

18. By reason of the foregoing, plaintiff WILLAIM BARTH, has been deprived of the services of said plaintiff DEBORAH BARTH, her ability to render such services having been impaired.

WHEREFORE, Plaintiffs demand judgment against the defendant on the first cause of action in the sum of $850,000.00 and on the second cause of action in the sum of $150,000.00 with interest from the 24th day of June 1972 together with cost and disbursements of this action.

HARRY H. LIPSIG
Attorney for Plaintiffs
100 Church Street
New York, New York

By KENNETH F. KAPLAN, a member
of this firm.

ANSWER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

WILLIAM BARTH as parent and natural guardian of the infant, DEBORAH BARTH and WILLIAM BARTH individually,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

- X

ANSWER

Civil Action No. 74 C 74

Defendant, UNITED STATES OF AMERICA, by its attorney, EDWARD JOHN BOYD V, United States Attorney for the Eastern District of New York, answering the plaintiffs' complaint, upon information and belief, respectfully alleges:

IN ANSWER TO THE "FIRST CAUSE" OF THE COMPLAINT:

FIRST: With respect to the allegation in paragraph "1" of the complaint that "Plaintiff is a citizen of the United States of America", defendant denies sufficient knowledge or information to form a belief as to truth thereof. With respect to the remaining allegation of paragraph "1" of the complaint, that "this action is brought under the Federal Torts Claims Act, 28 U.S.C. Sections

1346(b), 2671, et seq., as hereinafter more fully appears", defendant states that this allegation raises questions of law which are respectfully referred to the Court for determination.

SECOND: Denies sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph "2" of the complaint.

THIRD: Denies the allegations contained in paragraphs "3", "4", "5", "6", "7", "8", "9", "10", "11", "12", "13", "14", and "15" of the complaint.

IN ANSWER TO THE "SECOND CAUSE" OF THE COMPLAINT:

FOURTH: Denies sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs "16", "17", and "18" of the complaint.

AS A FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

FIFTH: Whatever injuries, loss, damages or aggrievement plaintiffs sustained as a result of the alleged accident were the proximate and legal result of the failure of DEBORAH BARTH to exercise due care and diligence and of her carelessness and negligence.

ANSWER

AS A SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

SIXTH: Defendant, UNITED STATES OF AMERICA, its agencies and employees, exercised the legally required care and diligence with respect to the matters alleged in the complaint herein.

AS A THIRD SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

SEVENTH: No breach of any legal duty or obligation owed to plaintiffs by defendant, or any agency or employee of the defendant, was the proximate or legal cause of any damages, loss, injury or aggrievement sustained by plaintiffs herein.

AS A FOURTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

EIGHTH: At the time and place of the alleged accident, DEBORAH BARTH was a trespasser and no legal duty or obligation owed to plaintiff by defendant was breached by defendant, its agencies or employees.

ANSWER

AS A FIFTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

NINTH: At the time and place of the alleged accident, DEBORAH BARTH was a bare licensee and no legal duty or obligation owed to plaintiff by defendant was breached by defendant, its agencies or employees.

AS A SIXTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "FIRST CAUSE" AND THE "SECOND CAUSE" OF THE COMPLAINT:

TENTH: DEBORAH BARTH assumed the risk for the alleged accident.

AS A SEVENTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE "SECOND CAUSE" OF THE COMPLAINT:

ELEVENTH: Plaintiff "WILLIAM BARTH, individually" has not presented any claim to the United States Coast Guard, Department of Transportation, or any other agency of the United States Government, with respect to the alleged cause of action asserted in the "SECOND CAUSE" of the complaint, which presentation of claim, pursuant to Title 28, United States Code, §2675(a), is a jurisdictional prerequisite for the institution of the alleged cause of action asserted in the said "SECOND CAUSE" of the complaint.

WHEREFORE, defendant UNITED STATES OF AMERICA, demands judgment dismissing the plaintiffs' complaint,

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plus costs and disbursements, and such other and further relief as to this Court seems just and proper.

Dated: Brooklyn, New York
April 11, 1974

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:

HOWARD J. STECHEL
Assistant U. S. Attorney

TO:
HARRY LIPSIG, ESQ.
150 Church Street
New York, New York 10007

PLAINTIFFS' NOTICE OF MOTION, FILED SEPTEMBER 12, 1975.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ SEP 12 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM BARTH as Parent and Natural Guardian of the Infant DEBORAH BARTH and WILLIAM BARTH, Individually,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF MOTION

Civil Action
No. ~~74 C 852~~ 74 C 74

PLEASE TAKE NOTICE, that upon the annexed Affirmation of HARRY R. SCHWARTZ, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before Judge Thomas C. Platt, at the Courthouse, located at 225 Cadman Plaza East, Brooklyn, New York, at 10:00 a.m. on the 22 day of September, 1975, for an Order directing that the issue of liability regarding negligence and contributory negligence be determined on a basis of comparative negligence as set forth in Chapter 69 of the Laws of New York, 1975, Section 1411 of the C.P.L.R., which went into effect September 1, 1975, and for such other, further and different relief as to this Court may seem just and proper.

Dated: New York, New York
September 11, 1975

Yours, etc.,

HARRY H. LIPSIG, P.C.
Attorney for Plaintiffs
Office & P.O. Address
100 Church Street
New York, New York 10007
(212) 732-9000

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PLAINTIFFS' NOTICE OF MOTION, FILED SEPTEMBER 12, 1975

TO: DAVID G. TRAGER
Attorney for Defendant
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

AFFIRMATION OF HARRY R. SCHWARTZ IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM BARTH as Parent and Natural Guardian of the Infant DEBORAH BARTH and WILLIAM BARTH, Individually,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

AFFIRMATION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

HARRY R. SCHWARTZ, attorney-at-law duly admitted to practice in the Federal Courts of New York, affirms under the penalties of perjury that the following statements are true:

He is trial counsel for the plaintiffs herein, and is associated with HARRY H. LIPSIG, P.C., attorney for the plaintiffs.

This Affirmation is submitted in support of plaintiffs' motion for an Order directing that the issue of liability regarding negligence and contributory negligence be determined on a basis of comparative negligence as set forth in Chapter 69 of the Laws of New York, 1975, Section 1411 of the C.P.L.R., which went into effect September 1, 1975.

The Section reads as follows:

> "§ 1411. Damages recoverable when contributory negligence or assumption of risk is established.
>
> In any action to recover damages for personal injury, injury to property, or

wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."

"§ 1413. Applicability.

This article shall apply to all causes of action accruing on or after September first, nineteen hundred seventy-five."

The above-entitled action was tried before Mr. Justice Thomas C. Platt without a jury. The Court is awaiting the submission of findings of fact and conclusions of law by both sides due September 25, 1975.

Although the Section sets forth the date of September 1, 1975, as the date it is to take effect, nevertheless, the Section should be applied retroactively to all cases prior to judgment.

WHEREFORE, affiant respectfully requests that the Court consider the questions of negligence of the defendant and contributory negligence, if any, of the infant plaintiff on a comparative basis as set forth in the above Section.

Dated: New York, New York
September 11, 1975

HARRY R. SCHWARTZ

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976.

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH and WILLIAM BARTH, individually

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA

Defendant.

----------x

Civil Action No. 74C74

PRE-TRIAL ORDER

This matter having come before the Court at a pre-trial conference held before the Honorable Thomas C. Platt pursuant to Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; and HARRY H. LIPSIG, P.C., HARRY P. SCHWARTZ, of Counsel, having appeared as counsel for the plaintiff, and DAVID TRAGER, United States Attorney, Edward S. Rudofsky, Assistant U.S. Attorney, of Counsel having appeared as counsel for the defendant, and the following action was taken:

I

NATURE OF ACTION AND JURISDICTION

This is an action for personal injuries, loss of services and expenses incurred.

The jurisdiction of the Court in invoked under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671, et seq.

The jurisdiction of the Court is not disputed.

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

The following were submitted, ordered filed, and are made a part of this order:

(a) Marked copies of the pleadings;

1) Summons and Complaint

2) Answer

3) Interrogatories

(b) An itemized statement of all special damages claimed on behalf of the plaintiff;

Dr. Bernzweig	$705.00 and continuing
Dr. Weiner	$248.00 and continuing
Dr. Uyar	$600.00 and continuing
Dr. Bgner	$480.00 and continuing
Dr. Fagan	$ 15.00
Anesthesia	$150.00
Lab and Drugs	$ 50.00 and continuing
Good Samaritan Hospital (6/24/72 - 7/3/72)	$3126.25

(c) A statement of the baiss of computation of all general damages claimed on behalf of the plaintiff - $850,000.00

(d) Uncontested Facts:

1. The accident occurred on June 24, 1972 sometime between 12 noon and 3 p.m.

2. The accident occurred on Democrat Point, Fire Island, New York

3. Deborah Barth, Allan Peers, Eileen Gallagher and Victor Behrend climbed the tower.

4. Robert Castelli and Rosalie Razzo remained on the beach.

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

5. Deborah Barth fell through an opening in the outer perimeter of the tower

6. The infant plaintiff sustained serious injuries.

7. At the time of the occurrence, and at all times prior thereto from 1967, the U.S. Coast Guard owned and maintained the tower involved herein.

8. Condition of involved tower:

1. No fence around base

2. Steps from beach to base removed

3. Trap door from main steps to watchhouse missing

4. Hatchcover for excape hatch missing

9. The tower was 65' high from the ground to its highest point.

(c) Separate lists of the witnesses who each party will call at the trial of the action on his case or defense, distinctly indentifying those witnesses to be called as experts and stating their field of experience. Plaintiff's witnesses:

Deborah Barth

William Barth

Patricia Barth

Eileen Gallagher

Allan Peers

Robert Castelli

Rosalie Razzo

Victor Behrend

Dr. R.L. Bernzweig - medical expert

Dr. Vasfi Uyar - medical expert

JNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

William Naimoli - physical therapist

Various teachers at Beech St. J.H.S.

Ptl. Robert Manno

Lt. Aliff

Lt. Commander Daniels

Allan Zammit

Defendant's Witnesses:

Robert Castelli

Rosalie Razzo

Eileen Gallagher

Allan Peers

Lt. Commander Daniels

Allan Zammit - Civil Engineering

Dr. Lawrence I. Kaplan - physician

Deborah Barth

Dr. Kaplan

(f) Contested Facts:

1. Existence of warning signs

2. Behavior of plaintiff after climbing steps to watchtower

3. Permanancy and residual effects of injury

Contested Law:

1. Negligence

2. Proximate causes

3. Contributory negligence

4. Assumption of risk

(g) Written waivers of claims and defenses which have been abandoned by the parties; None

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

(h) None

(i) Amendments to the pleadings; None at this time

The foregoing were modified at the pre-trial conference as follows:

III

It was agreed that the following exhibits presented by the plaintiff were admissible in evidence;

Photograms of site and tower

Police report

Bills and reports of all treating physicians

Hospital record ~~and bills~~

Engineers drawing of tower

Blue prints

Contract between defendant and Park Commission concerning use of this land and liability of defendant

out ~~Daily log reports of construction and repair of tower~~

out ~~Contract and specifications~~

out ~~Sheet entitled - "Non-Operational Lookout Towers"~~ dated ~~8/16/72~~

(B)

The following exhibits for identification were presented by the plaintiff but there was reserved to the defendant the right to object to their receipt in evidence on the specific grounds stated:

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

#13 Communication dated 8/17/72 re: Tower - to Coast Guard and any responses thereto.

#14 Evid Letter dated 8/25/72 of B. Wilhelm to Wilson,

" Evid Proceedings of Board of Survey - dated 5/8/72 re: Tower (two pages)

" Evid Letter of 8/25/72 of B. Wilhelm to Coast Guard

These are objected to on the basis of hearsay, opinion, relevence and being conclusory

IV

(A)

It was agreed that the following exhibits presented by the defendant were admissible in evidence;

Photos of Tower designated (A,B,C)

E. Dr. Kaplan's Rept (B)

The following exhibits for identification were presented by the defendant but there was reserved to the plaintiff the right to object to their receipt in evidence on the specific grounds stated: Report of Lt. Aliff, objected to on basis of hearsay and being self-serving.

V

The following are the issues of fact to be tried in this action: Liability of parties herein and resulting damages

VI

The following additional action was taken: None

VII

The probable length of the trial of this case is three days.

UNSIGNED STIPULATED PRE-TRIAL ORDER, FILED MARCH 23, 1976

Counsel who will try the case for the respective parties are:

For Plaintiff: Harry R. Schwartz, Esq.

For Defendant: Edward S. Rudofsky, Assistant U.S. Attorney

VIII

IT IS ORDERED that the Court may in order to prevent manifest injustice or for good cause shown, at the trial of the action orprior thereto upon application of counsel for either party, made in good faith, or upon motion of the Court, modify this Pre-Trial Order upon such conditions as the Court may deem just and proper.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE.

Attorney for Plaintiff

Attorney for Defendant

TRANSCRIPT OF TESTIMONY.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

BARTH, :

Plaintiff, :

74-C-74

-against- :

UNITED STATES OF AMERICA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

August 27, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

DIANNA LANDSMAN
ACTING OFFICIAL COURT REPORTER

Appearances:

HARRY R. SCHWARTZ, ESQ.
Attorney for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD RUDOFSKY, ESQ.
Assistant U.S. Attorney

THE COURT: Do you want to make a short opening statement on the record?

I have read the pretrial order and your brief.

MR. SCHWARTZ: We are prepared to receive, your Honor, we submitted a memorandum of law in which we set forth the basic facts in the law and we are now prepared to proceed and put our witnesses on.

THE COURT: I don't have a copy of your memorandum of law.

MR. SCHWARTZ: I know it was filed. I would appreciate it, though --

THE COURT: I have it here.

MR. SCHWARTZ: If we have an opportunity to sum up at the end of the trial --

THE COURT: Whatever you want. If you want to waive it, you may; if you want to sum up, you may.

MR. SCHWARTZ: I will waive unless counsel does it.

MR. RUDOFSKY: I will reserve at this point, your Honor.

D E B O R A H B A R T H , called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Miss Barth, you are the plaintiff, the one who is suing in this case?

A Yes.

Q On June 24, 1972, how old were you?

A 14.

Q What is your date of birth?

A February 2nd.

THE COURT: What year?

THE WITNESS: February 2, 1958.

THE COURT: Please keep your voice up so everybody can hear you.

A February 2, 1958.

Q February 2nd.

Now, what school were you attending?

A Beech St. Junior High School.

THE COURT: Where is that located?

THEWITNESS: In West Islip.

Q What grade were you in?

A I just finished eighth grade.

THE COURT: You were living in West Islip?

THE WITNESS: 676 Pat Drive.

Q On June 24, 1972, did you visit Fire Island?

A Yes.

Q About what time did you arrive there?

A In the morning, early around 10:00 o'clock.

THE COURT: Did you go over what they call the Robert Moses Bridge?

THE WITNESS: Yes.

Q Were you there with anybody else?

A Yes.

Q Who?

A Eileen Gallagher, Rosalie Rozzo, Laurie Maloney, Hillary Dunkel.

THE COURT: Who else?

THE WITNESS: That's all.

Q Now, did there come a time when you went to visit what is known as a tower on Fire Island?

A Yes.

THE COURT: Is this the tower at the western end of the beach at or near the inlet?

THE WITNESS: On Democrat Point.

THE COURT: The name does not mean anything to me. As I recall the beach, there is a big tower in the

center and if you walk way down to the west there is a tower or lighthouse.

THE WITNESS: The tower at the end of the beach, yes.

THE COURT: At the right-hand end of the beach as you face it; is that right?

THE WITNESS: Yes.

Q When you arrived atthis tower, who was present with you?

A Eileen Gallagher and Rosalie Rozzo.

Q Anybody else?

A No.

Q Did you eventually go up the tower?

A Yes.

Q At the time when you were going up the tower, did anybody else arrive?

A Yes.

Q Who?

A Alan Peers and Victor Behrend and Robert Castelli.

THE COURT: Victor Behrend and Robert Castelli?

THE WITNESS: Yes.

Q How did you get up the tower?

A Climbed up on the ladder.

Q Before proceeding up the ladder, what did you do?

A I lifted myself onto the cement.

MR. SCHWARTZ: For the record, I offer Plaintiff's Exhibit 2 in evidence. I am going a little bit out of order because that is how it was marked.

THE COURT: Any objections?

MR. RUDOFSKY: I have no objection.

THE COURT: We have to list it in evidence. It is a photograph of the base of the tower. Yes.

BY MR. SCHWARTZ:

Q I show you Plaintiff's Exhibit 2 in evidence and ask you whether the base of the tower shown in Plaintiff's Exhibit 2 is the way it looked at the time you arrived there?

A Yes.

Q I call your attention to a piece of metal at the base of that. Did you utilize that in any way in going up the tower?

A Yes, I put my foot on it.

THE COURT: That's all right. I can see. Keep it in front of you.

MR. SCHWARTZ: Plaintiff's Exhibit 1 in evidence, for the record.

THE COUNT: Any objection to Plaintiff's

Exhibit 1?

MR. RUDOFSKY: No objection.

THE CLERK: So received as Plaintiff's Exhibit 1 in evidence.

(So marked.)

Q I show you Plaintiff's Exhibit 1 in evidence and ask you whether the stairs shown in that exhibit are the stairs you used in going up the tower?

A Yes.

THE COURT: Stairs? You mean the ladder; is that right?

THE WITNESS: Yes.

THE COURT: When you nod your head she does not get anything down. All right.

MR. SCHWARTZ: I offer Plaintiff's Exhibit 3 in evidence.

MR. RUDOFSKY: No objection.

THE CLERK: So marked as Plaintiff's Exhibit 3 in evidence.

(So marked.)

Q And I show you Plaintiff's Exhibit 3 and ask you whether that is another view of the ladder used in going up to the top of the tower?

A Yes.

Q There should be some other views of the tower. I call for production of those photographs which I had given to counsel for the defendant at the time they were marked in evidence.

MR. RUDOFSKY: Your Honor, I am sure your Law Clerk can confirm this. I only took with me the defendant's exhibits. I will be more than happy to furnish them to Mr. Schwartz at this time, but they have already been marked as defendant's exhibits.

THE COURT: He may want them marked as Plaintiff's Exhibits.

MR. RUDOFSKY: I have no objection to that.

THE COURT: It's up to him.

Q I show you what had been marked Defendant's Exhibit A.

THE COURT: Are you going to re-mark it as a Plaintiff's exhibit?

MR. SCHWARTZ: I was going to ask a question about it.

Does your Honor suggest that I remark it?

THE COURT: Are you going to offer it or are you not?

MR. SCHWARTZ: I was going to ask her a question.

THE COURT: Show it as Defendant's Exhibit A.

Q I show you Defendant's Exhibit A and ask you whether this is a view of the entire tower, but I don't offer the markings on the exhibit.

A Yes.

THE COURT: Are you going to offer it as an exhibit?

MR. SCHWARTZ: I merely offer it as --

THE COURT: Mark it as Defendant's Exhibit A marked for the plaintiff.

Don't change the markings. Leave it Defendant's Exhibit A offered by the plaintiff.

THE CLERK: So received in evidence.

THE COURT: Without the ink markings.

(Exhibit marked Defendant's Exhibit A by the Plaintiff.)

MR. SCHWARTZ: I offer Plaintiff's Exhibit 4 in evidence.

THE CLERK: So marked as Plaintiff's Exhibit 4 in evidence.

THE COURT: Any objection?

MR. RUDOFSKY: No objection.

THE CLERK: So marked.

Q I show you Plaintiff's Exhibit 4 in evidence an

ask you whether that is another view of the ladders leading into the top of the tower?

A Yes.

Q Now, when you proceeded up the ladder to the top of the tower, what did you enter? A room of some kind?

A I entered a square room through the floor.

Q And was that room completely enclosed or partly enclosed?

Do you understand the question.

A It was partly.

Q About how high was the enclosure?

A Three feet, about waist level.

Q Now, beyond this three-foot wall, what was beyond it? What do you call it?

A Catwalk.

Q What was running alongside of the catwalk?

A Railings.

Q About how high was the railing?

A Waist level.

Q When you arrived at the location, were there any signs of any kind?

A No.

Q Were there any fences or barricades of any kind?

A None.

Q When you proceeded up, who else proceeded up at the same time?

A Eileen Gallagher and Victor Behrend.

Q Did someone else come up at any time?

A Alan Peers.

Q Now, when you got up into this room, what did you do?

A I looked down at the view.

Q After you looked out on the view, did you subsequently do anything else?

A Moved to my right.

MR. RUDOFSKY: Excuse me.

THE COURT: Then she had moved to her right.

Q You got into the room, and after you got into the room, did you stay in the room or did you do anything else after that?

A I climbed over the wall into the catwalk.

Q You climbed over into the catwalk?

A Yes.

Q All right. After you climbed over the catwalk, what were you doing?

A Looking out at the water.

Q Did anyone else climb over the lower part of the enclosure of the room?

A I didn't see anybody climb over.

Q Now, while you were at the catwalk observing the view, what happened after that?

A I moved over to my right.

Q Yes, and then?

A I just kept looking out.

Q I didn't hear what you said.

A I kept looking out at the view.

Q What did you do after that?

A I had my hands out on the bar.

Q That would be the railing?

A Yes.

Q When you say hands on the bar, were they up against or away?

A Away.

Q Could you demonstrate to the Court how you had your hands on the bar?

A Should I stand?

Q No, just show the Court.

A Like this (indicating).

Q What did you do after that?

A I took a step back and then I turned to my right and as I took another step I fell through the hole.

Q After you fell through the hole were you

unconscious?

A Yes.

MR. RUDOFSKY: Your Honor, I would object to any testimony at this time going beyond falling through the hole specifically, and anything after this accident has nothing to do with the liability.

MR. SCHWARTZ: I could withdraw it. I only asked it for a particular reason.

THE COURT: I will take it.

Did you fall all the way to the bottom?

THE WITNESS: Yes.

THE COURT: What did you land on?

THE WITNESS: On the sand.

THE COURT: On the sand?

Q Now, had you ever been up on this tower before?

A No.

Q While you were up there, did you walk all around the catwalk?

A No.

THE COURT: How high up were you?

THE WITNESS: Fifty-five feet.

Q Were you ever told that there was a hole up there?

A Never.

Q Did you see the hole before you fell through?

A No.

Q Had you heard about the tower before?

A Yes.

MR. SCHWARTZ: You may inquire.

CROSS-EXAMINATION

BY MR. RUDOFSKY:

Q Miss Barth, as you approached this tower, walking along the beach or the sand dunes, were you aware of the fact that it was quite large?

A Yes.

Q Were you aware of the fact that it was very tall?

A Yes.

Q Were you aware of the fact that if a person fell from the tower they were likely to be severely injured?

A I didn't think about it at the time.

Q If you can recall when you were fourteen years of age had you thought about it would you have realized that if a person fell from 50 or 60 feet that they would be hurt?

A Yes, yes.

Q Yes. You would. Is that your answer?

A Yes.

Q Had you been smoking at all on the day this accident happened?

A No.

Q Not at all?

A No.

Q Are you positive of that?

MR. SCHWARTZ: I object to it.

She has already answered to the best of her knowledge.

THE COURT: That is not necessary.

Q When I say smoking, I don't want there to be any misunderstanding. I am talking about cigarettes. And when I say on the beach I am talking about from the time you got to the beach until the time the accident happened.

THE COURT: What time of the day did the accident happen?

THE WITNESS: I don't remember exactly, but around 2:00 o'clock.

THE COURT: In the afternoon.

THE WITNESS: Yes.

THE COURT: What time did you get to Fire Island?

THE WITNESS: In the morning.

THE COURT: Morning or afternoon, what time did you get there?

THE WITNESS: Around 10:00 o'clock.

MR. SCHWARTZ: I was just trying to hear.

THE COURT: She said she got there around 10:00 o'clock and the accident happened about 2:00 o'clock.

Q Had you smoked cigarettes at all prior to this date, June, 1972?

A Yes.

Q Could you state for the Court how often you smoked in the four months prior to the accident?

A No, I don't remember.

Q Do you think you took a cigarette a day?

A No, not that much.

Q Did you smoke socially when you got together with your friends?

A Only once in a while.

Q I'd like to direct your attention to Plaintiff's Exhibit 2 in evidence, and if you would, I'd like you to explain to the Court in as much detail as you can, exactly how you went about getting from the beach onto the top of the base of the tower.

A I went over here and put my hands up there.

THE COURT: I am having trouble hearing you.

THE WITNESS: I hoisted myself. I put my hands here (indicating).

Q Indicating the left-hand cement block. And then what did you do?

A I lifted myself up and put my foot on there and got up easier.

THE COURT: The little metal piece?

Then you stood on that cement block to hoist yourself off the ground?

How high was that?

THE WITNESS: Not that high. I don't remember exactly.

THE COURT: Then what did you do?

THE WITNESS: There was a board here, a piece of wood. I stepped on that. I was leaning on here and I got up there and lifted myself up.

Q Was the board fixed or attached to the concrete?

A No.

Q Would it be correct to say it seemed to you a straight board that was just placed there?

A Just there.

Q It did not say United States Government on it?

A It was just a piece of driftwood.

THE COURT: Then you got up to the second landing.

Then what did you do?

THE WITNESS: Walked up here and started to climb up the ladder.

THE COURT: Were you the first one up?

THE WITNESS: I don't remember.

THE COURT: What was the distance between the top of the first cement block and the second cement block, the top of the second cement block?

THE WITNESS: Around three and a half, maybe four feet.

BY MR. RUDOPSKY:

Q What did you do? You hoisted yourself up?

A Yes.

THE COURT: Chin-ups.

THE WITNESS: Yes.

Q I would like to direct your attention next to Plaintiff's Exhibits 1, 3 and 4in evidence.

I would like you to point out to the Court in each one of the photographs the hole through which you accidentally fell.

A This one and here it is. That one and this one (indicating).

(continued next page)

Q Was this hole observable from the base of the tower if one looked up?

A I don't know because I didn't look up.

Q Did you see the hole as you were climbing up?

A No.

THE COURT: You say you did not look up from the base of the tower before you started to climb or as you were climbing?

MR. SCHWARTZ: I'm sorry. I didn't hear the question.

THE COURT: You didn't look up from the base of the tower before or as you started to climb?

Q The base, did you look up at where you were going before you started to climb?

A No.

Q You never looked up?

A No.

Q How about as you were approaching the tower, not when you were actually at the tower, but as you were one hundred feet away from the tower, fifty feet away from the tower, what distance were you looking at the base of the tower or looking at the tower generally?

A Just glancing at it.

Q You never saw the hole?

A No.

MR. RUDOFSKY: Your Honor, if I may, I would like to use the blackboard for the greater portion of the remainder of the examination.

THE COURT: It is very difficult to preserve whatever you put on there. If you have no objections --

MR. SCHWARTZ: No, not if the Court does not.

THE COURT: All right.

MR. SCHWARTZ: I was just wondering as far as the record is concerned.

THE COURT: If you want to preserve whatever he puts on it, you will have to take a picture of it.

Are you prepared to take a picture of it if it is necessary?

MR. RUDOFSKY: If it is necessary, I will take a picture of it.

(Whereupon, the blackboard was brought over to the area of the witness.)

THE COURT: Put it over here and you can stand over there.

Q Now, Miss Barth, I am going to draw a square on the blackboard and I intend this square to be an outline of the watchtower that was mounted on top of the metal frame as if one was looking from the top and the outer perimeter of

the square representing the railing of the catwalk.

The inner perimeter represents the enclosure that you referred to. It was also referred to as the wall.

Do we understand each other?

A Yes.

Q I believe you said you entered the enclosure through the floor as you reached the top of the main stairway; is that correct?

A Yes.

Q Would you explain -- to the left, right, which direction, tell me where to place the top of the stairway.

MR. SCHWARTZ: I am going to object.

Q Let the bottom represent the ocean.

THE COURT: There is no reason she cannot do that.

Q The bottom of the blackboard faces the ocean.

MR. SCHWARTZ: I am going to object to this because we have nothing yet to show what faced the ocean and what did not face the ocean.

THE COURT: Yes, we do. We have a picture that shows the ocean.

This has. Is this the ocean and that is running along here.

THE WITNESS: I can't tell.

THE COURT: You don't remember?

MR. SCHWARTZ: Water is on three sides, your Honor.

THE COURT: There is water here and here but this appears to be the ocean and on the outside.

THE WITNESS: I can't tell from looking at the photo.

THE COURT: Do you remember on which side the ocean was, which side of the tower?

THE WITNESS: It was in the middle of the beach.

THE COURT: The tower was in the middle of the beach so the ocean would be on the left-hand side of the tower as you face it, coming down the beach, right?

THE WITNESS: Yes.

THE COURT: And the bay that came in from the inlet was to the right.

What is the difficulty? I have been there, counselor. I remember the tower. You are not confusing me by drawing something on the blackboard.

MR. SCHWARTZ: There is something else in my mind. It becomes a question of what was facing the ocean.

THE COURT: Maybe she can't. Let us see whether she can.

He is trying to find out if she can remember.

MR. SCHWARTZ: That would presuppose a basic knowledge on her part.

THE COURT: He is entitled to inquire.

Q I have drawn a line across the bottom of the blackboard and I have written ocean.

THE COURT: That is the left-hand side from the place where you parked.

THE WITNESS: Yes.

Q Could you either tell me or by means of walking over to the blackboard, show the Court where you entered the inner portion of the watchtower as you have previously testified?

MR. SCHWARTZ: I will object to that.

THE COURT: OVerruled.

A I don't exactly remember where it was.

THE COURT: Can you tell us approximately where it was?

THE WITNESS: No.

Q Might it have been in the lower left as we are looking --

MR. SCHWARTZ: I object to where it might have been.

THE COURT: Overruled.

A I don't think so.

Q The upper right?

A I know it was on that side but I'm not sure where.

THE COURT: On the easterly side?

THE WITNESS: Yes, but I'm not sure where, on the bottom or on the top.

THE COURT: Is it to the right? North is on the top and south is under ocean and west is on the left-hand side.

Q In other words, you came up some place on the right-hand side of the tower. You are not sure whether it was toward the bay or toward the ocean but it was on the right-hand side?

MR. SCHWARTZ: I object.

THE COURT: Overruled.

MR. SCHWARTZ: She said she came up through the hole.

A As far as I can recall that's all I know.

Q What did you do next?

A I looked out at the ocean.

Q And could you step over to the blackboard and draw a small arrow showing which way you looked?

A (Witness complies.)

Q Is that arrow accurate not only as to direction

but as to approximately where you were along the catwalk?

MR. SCHWARTZ: Objection.

THE COURT: Overruled.

Is that approximately where you were standing when you were looking out at the ocean?

THE WITNESS: I don't remember, no.

Q But you were looking out that way.

What did you do next?

A I kept looking out this way and kept my hands on the railing.

Q You climbed over the rail, over the enclosure?

A The wall.

Q And you kept looking at the ocean?

A Yes.

Q Then what did you do?

A Kept my hands here, right here, (indicating) and I kept looking out and that's when I turned and I fell through the hole.

Q Where was the hole?

A I know it was in back of me from the pictures, on this side.

MR. SCHWARTZ: I am going to object to that.

THE COURT: He is just about to ask her, "Do you know where it was?"

Let's find out.

MR. SCHWARTZ: She said she never saw the hole.

THE WITNESS: I saw it in the pictures.

THE COURT: Is that about where it was?

THE WITNESS: I know it was in back of me. It could have been closer.

Q Was it all the way at the other end of the tower?

A It couldn't have been because I only took one step.

Q Now, I believe you previously testified that there were other people who climbed up the tower with you; is that correct?

A Yes.

Q Let us take them one at a time. I believe you mentioned Eileen Gallagher.

A Yes.

Q From the time that you first climbed onto the catwalk until the time that you fell through the hole, do you know where Miss Gallagher was standing?

A No.

Q Do you know if she was on the catwalk?

A No.

THE COURT: Do you know whether she ever got up to the room?

THE WITNESS: Yes.

THE COURT: In other words, you saw her in the room, that was the last time you saw her?

THE WITNESS: Yes.

Q Did you speak to her at all?

A Just about the view.

Q You spoke to her but you don't know where she was standing, is that correct?

MR. SCHWARTZ: I object to that.

THE COURT: She said she didn't know where she was at. She went over the rail, is that right, Miss Barth?

THEWITNESS: Yes.

MR. SCHWARTZ: The way he spoke to her but --

THE COURT: But she didn't know where she was. She wasn't looking back at Eileen.

Q At the time that you spoke to her, were you on the catwalk?

A I don't remember.

Q You did speak to her?

A Yes.

Q Do you know where she was standing when you spoke to her?

A Yes.

Q I believe that you said that Victor Behrend climbed up to at least the enclosure of the tower; is that correct?

A Yes.

THE COURT: Counsel, do you want to sit down?

Q Again, with reference to the period when you climbed out on the catwalk and ended when you fell through the hole, do you know where Mr. Behrend was?

A No.

Q Did you speak to him?

A Not that I remember.

Q I believe you also testified that at some point Alan Peers climbed the tower; is that correct?

A Yes.

Q Where were you when Mr. Peers first got to the inner room?

A On the catwalk.

Q You saw him come up?

A No.

Q How do you know when he came up?

A I heard his voice.

Q Did you speak to him?

A No.

Q Not a word?

A No, I can't remember.

Q You can't remember or you didn't speak to him?

A I can't remember.

Q How about Eileen Gallagher, you can't remember or you didn't speak to her?

A I remember speaking to her about the view but I don't know exactly what was said.

Q Did anyone else climb up the tower?

A No.

Q Was there a particular reason that you climbed out onto the catwalk?

A Yes.

Q Excuse me?

A Yes.

Q What was the reason?

A Just wanted to look at the view.

Q Was it a different view than from inside the wall?

A No.

Q When you climbed over the wall onto the catwalk were you afraid of falling?

A No.

Q Not at all?

A No.

Q did you look to make sure there was something

there to step on?

A Yes.

Q Why did you do that?

MR. SCHWARTZ: I object to the question, your Honor.

THE COURT: Overruled.

A Because I always look where I step.

Q Do you look where you step --

MR. SCHWARTZ: I object to that question.

THE COURT: Overruled.

A It is a natural reaction.

Q Do you look to see where you are going?

A Yes.

Q Do you look to see if there is something there to step on?

MR. SCHWARTZ: Pinpoint the time, please.

A At that time I was looking at the ocean and I knew there was a bar in front of me and I knew there was a catwalk underneath me and I felt I had no reason to look in any other direction.

Q Did you give a deposition in this case, Miss Barth?

A Yes.

Q I want to direct your attention to pages 46 --

MR. SCHWARTZ: What?

Q Page 46, line 19 to page 47, line 15.

I'd like to ask you to read that --

THE COURT: To yourself.

Q -- to yourself.

THE WITNESS: May I get my glasses?

THE COURT: We will take a five-minute recess while you get your glasses.

(Recess taken.)

(After recess.)

Q Miss Barth, have you read the portion of the deposition that I indicated to you?

A Yes.

MR. RUDOFSKY: Your Honor, with your permission, I would like to read it aloud into the record.

THE COURT: I don't know if it is proper procedure. Read the questions and answers and ask her if it is what she said.

Go back and use the lectern.

Q Miss Barth, are the answers that you gave in the deposition the true answers and the correct answers to the questions?

MR. SCHWARTZ: I object to the questions and also may he direct himself to a specific question?

THE COURT: Read the questions and read the answers and ask her if it was asked and if she gave that answer.

Q Were you asked these questions and did you make these answers: Page 46, line 19.

"Question: What was your purpose in looking over the wall?

"Answer: Well, I didn't want to fall onto the ground."

Was that question asked and did you give that answer?

A Yes.

Q Was that the true and correct answer?

A Yes.

Q "Question: In other words, you were concerned whether there was something to stand on beyond the wall, is that correct?

"Answer: Yes."

Was that question asked and did you give that answer?

A Yes.

Q Is that a correct and true answer?

A Yes.

MR. SCHWARTZ: I object.

THE COURT: He is entitled to ask that question.

Q "Question: In other words, you were concerned whether there was a danger of your falling; is that correct?

"Answer: Yes."

Was that question asked and did you give that answer?

A Yes.

Q "Question: Because you were well aware, were you not, that if you went over the wall and there was nothing there you might very well fall a very great distance.

"Answer: Yes."

Was that asked and answered?

A Yes.

Q Was that a true and correct answer?

A Yes.

Q "Question: And you realized if you fell a very great distance you might hurt yourself; is that correct?

"Answer: Yes."

Were you asked those questions and did you make those answers?

A Yes.

Q Was that a true and correct answer?

A Yes.

Q Miss Barth, can you remember anyone laughing while you and Miss Gallagher and Mr. Behrend and Mr. Peers were in the enclosed part of the tower or on the catwalk or any combination thereof?

A None.

Q No laughter?

A No.

Q Did anyone run at any time?

A No.

Q Was there any conversation about cigarettes?

A No, I don't remember.

Q Miss Barth, during the direct examination I believe you testified that the inner portion of the watch-tower was partly enclosed.

Could you explain what you mean by partly?

A The room itself?

Q As I wrote it down in my notes, you said it was a partly enclosed room and I would like you to explain to the Court what you mean by partly.

A The wall went up waist-level.

Q Did it go completely around the room?

A Completely around.

MR. RUDOFSKY: I have no further questions of the witness at this time, your Honor.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q You testified on direct examination that you took a step back and you turned.

Now, after you turned what happened?

MR. RUDOFSKY: Your Honor, I would object to this as going beyond the scope of the cross. He is asking her about something she testified to on direct.

THE COURT: Sustained.

Q When you took a step back, did you fall through the hole on that step?

A No.

Q So that something continued after that step?

A Yes.

MR. SCHWARTZ: That's all.

RECROSS-EXAMINATION

BY MR. RUDOFSKY:

Q With your Honor's permission, if I may have a recross?

THE COURT: Yes, of course.

Please sit down.

MR. SCHWARTZ: It's hard to hear.

THE COURT: Tell your client to speak up.

Q As I have indicated on the diagram, you took one step and then in response you indicated that you took one step and then something happened. Would you explain to the Court as precisely as you can what happened from the moment you were holding onto the railing with both hands as you testified and took that one step back, then what happened?

A I turned to my right and as I went to take another step that's when I fell through.

Q Were you moving your legs?

A Yes.

MR. RUDOFSKY: No further questions, your Honor.

MR. SCHWARTZ: That's all.

THE COURT: All right, step down, thank you.

MR. SCHWARTZ: I would like to put Alan Peers on but your Honor made some comment --

THE COURT: He does not want you to put him on until he has had a chance to examine him.

I think we will put him on tomorrow morning, first thing. Do you have witnesses you can proceed with?

MR. RUDOFSKY: Yes, I do, your Honor.

THE COURT: That's all you have then?

MR. RUDOFSKY: The defense calls William Aliff to the stand.

WILLIAM ALIFF, called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Mr. Aliff, are you presently a member of the United States Coast Guard?

A I am.

Q Are you appearing here today at my request?

A Yes, sir.

Q How long have you been in the Coast Guard?

A It will be twenty-three years this year.

Q What is your present rank?

A Lt. Commander.

Q Some time prior to June 24, 1972, were you in any way connected with the Coast Guard station at Fire Island?

A I believe I would be Group Commander in Rockaway at that time.

Q Did Group Rockaway include Fire Island?

A Yes, sir.

Q Prior to your assuming your Group Command had you had any other connection with the Fire Island Coast Guard Station?

A Yes, sir, I was commanding officer of Fire Island Station.

Q What was the date that you assumed command and what date did you give up command?

A I can't recall the exact dates.

Q Do you know the years?

A I believe it should be about 1968 that I assumed command at Fire Island and I was there for two years.

MR. SCHWARTZ: After he assumed command?

THE COURT: Commanding Officer at Fire Island 1968 to 1970.

To date are you still Group Commander at Fire Island?

THE WITNESS: No, sir.

THE COURT: How long were you Group Commander at Fire Island?

THE WITNESS: Three years.

Q Do you know who succeeded you as Station Commander at Fire Island?

A Lt. Daniels.

Q Is that Amos Daniels?

A Amos Daniels.

Q Is Amos Daniels still a member of the United States Coast Guard?

A No, sir. He is retired.

Q Now, at the time that you assumed command of the Fire Island station some time in 1968, was the tower in operation?

A No.

Q When I say tower, now, I am referring to the tower at Democrat Point. Do we understand each other?

A Were we using it for watches and so forth?

Q Yes.

A No, it was not.

Q What was its status?

A It was not being used for watches.

Q Was it being used for any official functions?

A No, sir.

Q Watches were not stood there?

A Yes, sir.

Q Were any personnel assigned to maintain the tower?

A No, sir.

Q Did its status change during the tenure of Your command at Fire Island?

A It was deteriorating and vandalism was occurring. Windows had been broken on it.

Q But it was not put into operation at this point?

A No, sir.

Q Were personnel assigned to it at any point?

A No, sir.

THE COURT: Where did it have windows, Commander?

THE WITNESS: That would be along the inner rail.

THE COURT: The inner rail just above the catwalk?

THE WITNESS: The inner area, and they had sloping windows so they could look out on the inlet and the bay.

Q During the time that you were commander of the Fire Island station, did you cause inspections to be made of the tower?

MR. SCHWARTZ: I object to counsel leading the witness.

THE COURT: Overruled.

A No, sir.

Q What was the nearest piece of equipment that the station operated, nearest to the tower?

A You are probably referring to navigation. That would be on the Fire Island breakwater, a light and a radio beam on there.

Q From time to time did you cause personnel from the station to go to this beacon?

A Yes, sir.

Q What is the reason that they went there?

A To check out equipment or do preventive maintenance plus recharges of the light as it was required.

Q When these personnel went to the beacon did they also check the tower?

MR. SCHWARTZ: Objection.

THE COURT: Overruled.

A They would look at it as they went by to check the condition of it.

THE COURT: How far away were the light and the radio beam from the tower?

THE WITNESS: I would have to estimate, your Honor, about half a mile. That's an estimation.

Q Now, during your tenure at Fire Island, did you at any time cause warning signs to be placed on or near the tower?

A Yes, sir.

Q What was the nature of these signs?

A These would be the standard United States Government property, no trespassing, penalty subject to fine.

Q Where would these signs be placed?

A Around the base of the tower.

Q How frequently were these signs placed at the

base of the tower?

A They were replaced as often as we found they were missing.

Q Would you characterize, for the Court, or estimate for the Court, how often that was or how infrequently that was?

A I would have to estimate.

MR. SCHWARTZ: I object, if he doesn't know.

THE COURT: Overruled.

A Do you want an answer?

Q Please answer.

A As I said, I'd have to estimate about every three or four months.

Q Mr. Aliff, I am now going to hand you a two-page document that has previously been marked Defendant's Exhibit D for identification.

MR. SCHWARTZ: I cannot hear the questions. Defendant's Exhibit what?

MR. RUDOFSKY: D for identification.

THE COURT: Direct your questions from there. He is evidently hard of hearing and you might as well get used to it and start your examination from there.

Q Do you recognize Defendant's Exhibit D for identification?

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A Yes, sir.

Q What is it?

A Informal investigative report.

Q Who authorized it, if you know?

A Who authorized it?

It is under my signature, sir.

Q Was there a particular incident that was investigated and is the subject of that report?

MR. SCHWARTZ: I object to the form of the question.

THE COURT: It is twofold but I will allow it, yes.

There is an incident?

THE WITNESS: Yes.

Q What is that incident?

A It was the incident that involved --

MR. SCHWARTZ: I object to referring to something not in evidence.

THE COURT: I'll allow it.

A The subject of the report is an informal investigation into all circumstances connected with the personal injury at Fire Island Inlet on 23rd of June, 1972.

MR. SCHWARTZ: May the record indicate that the witness is reading from Defendant's Exhibit D. He is

not testifying.

THE COURT: Overruled.

MR. RUDOFSKY: I will offer Defendant's Exhibit D into evidence.

MR. SCHWARTZ: May I have a voir dire on it, please?

THE COURT: Yes, you may.

VOIR DIRE EXAMINATION

BY MR. SCHWARTZ:

THE COURT: Counselor, please use the podium, please use the podium to direct your questions to the witness.

Do you understand me?

Let him use the podium and you stand back and you sit down.

Q Were you on duty at the time these writings were made?

A That particular time?

Q Y

A Ye sir.

THE COURT: Yes, he said.

Q I show you the date, June 30, 1972. Did you not testify that you were there only for a period of two and a half years from 1968?

MR. RUDOFSKY: Your Honor, I object. The record is clear that the witness testified that he was the Group Commander which included Fire Island.

THE COURT: You can ask him was he on duty? He said yes, and didn't you testify you were on from 1968 to 1970?

His testimony was that he was on from 1968 to 1970, he was commanding officer at Fire Island from 1970 to 1973. He was Group Commander of Rockaway Group which included Fire Island; is that correct, Commander?

THE WITNESS: Yes.

Q Well, as Group Commander after 1968 --

THE COURT: 1970 to 1973.

MR. SCHWARTZ: I think the witness broke it up.

THE COURT: From 1970 to 1973 he was Group Commander of Rockaway Group which included Fire Island.

Q Where was your original assignment from?

MR. RUDOFSKY: I object.

THE COURT: Sustained. Fire Island only.

MR. SCHWARTZ: That is the purpose of this.

THE COURT: Fire Island only. The only question you asked him was when he prepared it and

under what circumstances. You are looking into the authenticity of that document and that document alone, not cross-examination.

Q What do you mean by an informal investigation?

A What is an informal investigation?

Q What do you mean by an informal investigation?

A This is an investigation that is held by a single member. It is not a formal investigation which would consist of two or more persons.

Q And it is a question of one person instead of more than one person?

A That is one condition of it, yes, sir.

Q Is there anything else involved?

MR. RUDOFSKY: I object. The witness did not have an opportunity to answer the first question.

THE COURT: Are you withdrawing your first question?

Q This individual whom you state would have made an informal investigation, did you order him to make an informal investigation?

MR. RUDOFSKY: Your Honor, I object. There is nothing in the document that indicates that anyone was ordered to make an investigation.

THE COURT: The Commander can answer that

question. He can take care of himself. Overruled.

Did you order anyone to make the investigation?

THE WITNESS: Yes, sir.

Q What was the name of the person you ordered?

A Lt. Daniels.

Q What?

A Lt. Daniels.

Q Did Lt. Daniels submit anything to you in writing?

A He did.

Q Outside of Defendant's Exhibit D?

A Yes, sir.

Q You have it?

A I would not have it personally, no, sir.

Q Did Lt. Daniels sign it?

A Yes, sir.

Q Do you recall when he stated he made the investigation?

A I don't recall, I don't have the investigation information.

Q Would he have made it himself?

A Possibly.

Q Now, the statement that is listed here that the informal investigation officer having thoroughly

into the facts and circumstances connected with the injury, are you familiar with what inquiry was made by an investigation?

A If I can recall from Mr. Daniels' report, we had a police report, police officer's report, we had questioned the hospital as to the extent of the injuries, and we had attempted to get some information from the parents, but had not.

Q And that is the investigation you had reference to?

A That is the information you asked me for, sir.

Q That is the information that you also have reference to; is that correct?

A Yes, sir.

Q In addition to Lt. Daniels, did you personally or did you have anybody else in addition to Lt. Daniels check out the information that Lt. Daniels supposedly gave you, that you just referred to?

A No, sir.

Might I ask a question?

Q No, you can't ask a question.

Is there any reason why the so-called investigation that was made by Lt. Daniels is not part of any exhibit?

MR. RUDOFSKY: I am going to object to that,

your Honor.

THE COURT: Overruled.

A Why it is not?

Q What?

A Yes, sir.

Q Why?

A This is my report written on Lt. Daniels' investigation.

Q Why isn't the investigation attached to it or made a part of it?

MR. RUDOFSKY: I object.

THE COURT: Overruled.

A You're asking me --

Q I asked you a question.

THE COURT: Don't argue with him.

A This is a copy. You will find Lt. Daniels with the original and the original of it in files.

Q Why didn't you bring it?

A I have no access to those files. I am not at that command any more.

Q Is that report by Lt. Daniels available?

A I would say so.

Q Where is it now?

A I would say there is a copy on file at the

Rockaway Station, the original was sent to District.

MR. SCHWARTZ: May I request that the defendant produce this report of Lt. Daniels?

THE COURT: Take it one thing at a time.

Do you object to Defendant's Exhibit D?

Q Do you know whether Lt. Daniels will be here?

A He is retired, sir.

Q That was not the question.

A That is the only answer I could give you.

Q Do you know whether Lt. Daniels will be here?

A I do not know, sir.

THE COURT: He said he didn't know.

MR. SCHWARTZ: May I inquire?

THE COURT: Will you please let me know whether you object to Defendant's Exhibit D before you do?

MR. SCHWARTZ: If he will be here then I won't ask any more questions. If he won't be here, I find it necessary.

MR. RUDOFSKY: Your Honor, may I be heard?

THE COURT: Is Lt. Daniels going to appear?

MR. RUDOFSKY: I told him he is not going to be here.

THE COURT: Do you object to Defendant's Exhibit D?

MR. SCHWARTZ: Yes.

THE COURT: Your objection is sustained.

MR. RUDOFSKY: May I be heard on the legal argument?

I think that Mr. Schwartz' objection --

THE COURT: This is a document based on another document and even under the liberalized rulings of 803 it is not admissible without the other document. The report is incomplete.

MR. RUDOFSKY: Your Honor, we have a deposition.

THE COURT: Bring in the other document that it is based on. That is what he wants and he is entitled to it. This is double hearsay. Your two originals are filed together.

MR. RUDOFSKY: May I have a moment, your Honor?

Your Honor, I will withdraw my offer of Defendant's Exhibit D at this time.

I will ask the witness if he gave a deposition in this case.

THE WITNESS: Yes, sir.

MR. RUDOFSKY: I will now show the witness a copy of his deposition.

MR. SCHWARTZ: I object to him showing any deposition.

THE COURT: He can show it to him; what happens next may be objectionable but he can show it.

Q I will ask him to address his attention to pages 10, line 24 of the deposition to page 11 at line 17 of the deposition.

MR. SCHWARTZ: I object to him reading the deposition.

THE COURT: Objection sustained.

MR. RUDOFSKY: Your Honor, I have no further questions of this witness at this time.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Did you ever personally visit this tower?

A No, sir.

MR. SCHWARTZ: That's all.

THE COURT: You may step down, Commander.

MR. RUDOFSKY: Your Honor, at this time the Government had hoped to call Amos Daniels, the Commander of the Coast Guard station at the time of the accident. A deposition was taken of Mr. Daniels by Plaintiff with Government counsel present on February 27th of this year and I was recently informed that Mr. Daniels is retired and living in Virginia. He is not amenable to and he is unwilling to come to

New York to give testimony on the trial date or any time in the near future.

Accordingly, I believe the witness is unavailable under the Federal Rules and accordingly offer the deposition in evidence in lieu of his actual appearance at trial.

THE COURT: Any questions, counselor?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: Is there any question about that, that he is living in Virginia, the Commander has testified that he has retired.

MR. SCHWARTZ: I know, but we didn't cross-examine him.

THE COURT: It doesn't make any difference.

MR. SCHWARTZ: Your Honor, they took the deposition.

THE COURT: That doesn't make any difference.

MR. SCHWARTZ: Well, I object.

THE COURT: Overruled.

Defendant's Exhibit, has it been marked?

MR. RUDOFSKY: Your Honor, with regard to this exhibit, I believe that counsel for plaintiff has the signed copy in his possession. We have a certified but unsigned copy which I am giving to the Court Clerk

at this time.

THE COURT: Between the two it doesn't make much difference.

THE CLERK: Document marked Defendant's Exhibit F.

(So marked.)

MR. RUDOFSKY: The only correction I see, your Honor, looking at the signed copy, is on page 9 where Mr. Daniels at line 11 indicated that --

THE COURT: We don't have to go through all that. Have him markthe original and give me the original.

MR. RUDOFSKY: Your Honor, at this time the Government will call Eileen Gallagher as a witness.

THE COURT: All right.

E I L E E N G A LL A G H E R , called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Please state your name for the record.

A Eileen Gallagher.

Q Miss Gallagher, how old are you?

A 17.

Q Where do you reside?

A 532 Michael Avenue, West Islip.

Q How long have you lived at that address?

A Seven years.

Q Do you have normal eyesight and hearing?

A I wear glasses.

Q How long have you worn glasses?

A Eight years.

Q Were you wearing them on the day of the accident?

A No.

Q By the accident, I am referring to Miss Barth's accident.

A Right.

Q You were not wearing them?

A Right.

Q Are you nearsighted or farsighted?

A Nearsighted.

Q Were you acquainted with Miss Barth?

A Yes, I am.

Q Would you explain to the Court what your relationship is at this time?

A At this time?

Q At this time, yes.

A We are just friends. We don't make a point of seeing each other.

Q Do you socialize together?

A Not usually.

Q What was your relationship at the time of the accident?

A We were a lot better friends. We did things together.

Q And do you recall when you first met Miss Barth?

A When I was 13.

Q How old were you at the time of the accident?

A 13.

Q Then did there come a time on the 24th day of June, 1972 when you visited the Coast Guard tower at Democrat Point?

A Yes.

Q Were you accompanied by anyone?

A Yes.

Q Would you tell the Court who?

A Debbie Barth and Rosalie Rozzo.

Q Is that all?

A Yes.

Q Were any or all of these people, Mr. Peers, Mr. Castelli or Mr. Behrend with you at any time on that day?

A We were at the tower and they came up after us.

Q Had you spoken to them at all, any of those

three named persons, Peers, Castelli or Behrend, on or before you got to the tower?

A No.

Q Do you recall whose idea it had been to go to the tower?

A No, I don't.

Q Did you give a deposition in this case?

A Yes, I did.

Q I am going to hand you a copy of this deposition.

MR. SCHWARTZ: I object to handing a copy of the deposition unless it is necessary for him to refresh her recollection.

THE COURT: That is what he is trying to do.

She said she did not recall. I don't know. We will see.

Q I'd like you to --

THE COURT: The proper way is to ask whether this question was asked and whether she gave this answer.

Do it the proper way.

It is to her benefit to do it the way he did it.

Q Were you asked these questions and did you give these responses:

"Question: Do you recall whose idea it would

be to go to the tower?

"Answer: I think Alan wanted to go and I think we decided to go with him."

Was that response true?

A I don't recall.

I didn't know Alan then. I didn't talk to him. I just went with Debbie and Rosalie.

Q Was the response that you gave during the deposition true?

MR. SCHWARTZ: I submit she has answered the best she could.

A No, I suppose it is not.

Q During the course of that deposition were you also asked the following questions and did you give the following answers:

"Question: Did you remember whose company you were in?

"Answer: Yes.

"Question: Would you please tell us?

"Answer: Rosalie Rozzo, Alan Peers, and his friend Bob Costello, I don't know Bob.

"Question: Might his name have been Bob Castelli?

"Answer: Yes, sir, and another friend of Alan's.

I think he was a male nurse."

Were you asked those questions and did you give those answers?

A Yes, I did.

Q And were those answers the truth?

A Yes.

Q I'll ask you again whose company were you in.

MR. SCHWARTZ: I object to that.

A I was on the tower. I was with Alan, his friend and me and Debbie and Rosalie, and before that I was with Rosalie and Debbie.

Q I think you just said before that you were with Rosalie and Debbie; is that correct?

A Yes.

Q During the course of the deposition --

MR. SCHWARTZ: Just a moment. Let me find the place, what line.

MR. RUDOFSKY: Line 10 or 11.

Q During the course of the deposition were you asked the following questions and did you give the following answers:

"Question: Let me stop you there. Were you all walking together?

"Answer: Yes."

MR. SCHWARTZ: I don't see it, line 6?

Q Go ahead.

"Question: Were you all walking together?

"Answer: Yes.

"Question: The whole group of you?

"Answer: Yes.

"Question: And everyone in the group, at least at that point, knew everyone else?

"Answer: Right."

A I didn't know them. They were walking in back of us.

Q Were those answers the truth?

A Partially.

Q As I understand it, you climbed the tower.

A Yes, sir.

Q Were you scared when you climbed the tower?

A Yes.

Q At that time you were how old?

A 13.

Q What level of education had you reached?

A I had just finished the eighth grade.

Q You were going into the ninth grade?

Now, I would like you to direct your attention to the blackboard. I have drawn on the blackboard a large

rectangle and a smaller rectangle. The perimeter of the larger rectangle is to represent the railing of the watchtower, looking down from the top, and the smaller rectangle is intended to represent the wall between the inside enclosure and the catwalk. The ocean side of the tower is at the bottom of the blackboard.

Could you step to the blackboard and indicate where it was that you first entered the inside room or enclosure?

A I walked through here, there was a wall there and we just climbed over the wall.

THE COURT: I cannot hear you.

A We came up from the bottom.

Q From where?

A I put a little X there.

Q Put a little X there.

MR. SCHWARTZ: May we erase what is over there?

THE COURT: Let us not waste time.

A We came up. There was a wall about three feet and you had to go over it to get onto the catwalk and that is what we did.

Q Where did you go?

A I can't be sure. I think I went over here.

Q Is that the side opposite the ocean?

THE COURT: Did you go over the wall?

THE WITNESS: Yes, I did.

THE COURT: Over the catwalk?

THE WITNESS: Yes.

THE COURT: Put a Y there.

It looks like a Z to me.

Okay.

Q Are you aware of the fact that there is a --

MR. SCHWARTZ: Your Honor, I can't hear counsel.

THE COURT: Ask your question from back there.

Q At any point after you reached the inner chamber of the watchtower, did you become aware of the fact that there was a hole or escape hatch in the catwalk?

A Yes.

Q Would you draw a circle to show where the hole or escape hatch was?

A (Witness complies.)

Q On the ocean side?

A Yes, sir.

Q How did you become aware of the hole?

A By walking around.

Q Did you walk around while you were on the inside or while you were on the catwalk?

A On the catwalk.

THE COURT: Had you been completely around?

THE WITNESS: Yes, I walked around.

THE COURT: Is this before or after the accident?

Q Where was Miss Barth standing at the time that you climbed onto the catwalk?

A I don't know.

Q Where was she standing when you walked around the catwalk?

A Somewhere, I don't recall where she was standing.

Q Did you speak to her?

You may take the stand.

Did you speak to her?

A Not really, about the view, that is just about the view, how nice it was.

Q Where were you when you spoke to her?

A I was back there by the wire.

Q On the side of the tower opposite the ocean?

A Yes.

Q Where was Miss Barth when you spoke to her?

A On the other side, by the hole.

Q Would you indicate by means of a star on the diagram where she was?

A Around there.

THE COURT: At the time you spoke to her?

THE WITNESS: Yes.

Q What was she doing?

A Looking at the view.

Q At this point had you already walked around the catwalk?

A I don't know.

THE COURT: Do you recall who said what to whom about the view?

THE WITNESS: That is what we talked about.

THE COURT: Do you recall who said what to whom?

THE WITNESS: No.

Q Did there come a point when you observed Debbie speaking to Alan?

A No, I can't remember.

THE COURT: Wait a minute. Before you get to that part, go ahead.

Q During the deposition that we have previously referred to, did you, were you asked the following questions and did you give the following answers:

"Question: You say you were fooling around. What do you mean by that?

"Answer: Just laughing, just talking. I was just sitting and watching and Alan was talking to Debbie and Debbie was just moving and talking, walking.

I was about to remind her the hole was there and that is when she fell through."

Do you recall giving those answers to those questions?

A Yes.

Q Was that a true answer?

A Yes.

Q Is your testimony at this time that you cannot remember what Debbie did?

A I can't.

THE COURT: Do you remember where she was standing when she was laughing and fooling around and talking to Peers?

THE WITNESS: No, I don't.

Q Miss Gallagher, do you remember seeing Miss Barth smoking at all on the date in question?

A No.

Q Do you recall seeing anyone smoking on the tower?

A No.

THE COURT: When you shake your head she does not get anything down.

THE WITNESS: No, I don't.

Q During the course of the deposition that we

have referred to, were you asked the following questions:

MR. SCHWARTZ: May I have the line?

MR. RUDOFSKY: Page 18, line 8 and 9.

"Question: Were they moving on the tower?

"Answer: Yes."

Were you asked that question and did you give that answer?

A Alan might have been. I don't know.

THE COURT: Who is the "they" in that question, Miss Gallagher? Who is the "they" in that question?

THE WITNESS: Alan, me and Debbie.

THE COURT: All of you?

THE WITNESS: Yes.

Q As I understand your testimony, you will recall Debbie Barth talking while she was on the catwalk; is that right?

A Yes.

Q Do you recall who she was talking to in addition to yourself?

A No.

Q Do you recall where she was standing at the time she was talking?

A Well, I don't know. She might have been looking at the view, looking at the water, just talking to me.

Q While she was looking at the view?

A Well, she was looking at the view, standing and looking at the view.

MR. SCHWARTZ: I'd like the Reporter to read the testimony .

THE COURT: She has repeated it three times. Go ahead.

Q Was she facing you when she was talking to you?

A I can't remember.

Q Was she moving when she was talking to you?

A No, I don't think so.

Q Was she or you can't remember?

A I don't think so.

Q During the course of the deposition on page 23, line 19 through page 24, line 8,

"Question: Was she facing you?

"Answer: Yes, she was opposite me and talking to me.

"Question: She was moving around the tower, she was facing you; is that correct?

"Answer: Yes.

"Question: She had her face towards you; is that right?

"Answer: Yes, I guess so, but I can't be

positive.

"Question: Is that what you recall?

"Answer: Yes."

Would it be fair to say, based on your recollection, that she was --

MR. SCHWARTZ: I object to that question.

THE COURT: A question about the reading?

MR. SCHWARTZ: Yes.

THE COURT: Let me see it.

Up to that point, did you give those answers to those questions?

Sit down, counselor.

MR. RUDOFSKY: He is withdrawing his objection. He objected at line 5, your Honor.

THE COURT: In the light of the answer, I don't see any objection to it. I will take the question, 5 through 8 and don't ask 9. In light of the answer it doesn't make any difference.

Q "Question: Would it be fair to say based on your recollection, that she was walking straight ahead but looking to her right?"

"Answer: Yes."

Were you asked those questions and did you give those answers?

A Yes, I did.

Q Is that the truth?

A I didn't know what was going on at that time.

Q Did you answer the question truthfully when it was asked to you?

A To the best of my recollection I did.

MR. SCHWARTZ: I object to the form.

THE COURT: Overruled.

MR. RUDOFSKY: I have no further questions of this witness, your Honor.

(continued next page)

MR. SCHWARTZ: To get the continuity of what was said by counsel on page 18, your Honor, he started off on line 8.

MR. RUDOFSKY: I object.

THE COURT: No, no, you can't read her testimony. You can ask her questions, counsel. You can't read.

You can ask her questions. She is a witness on the witness stand.

MR. SCHWARTZ: May I say something for half a second?

Counselor read something and he didn't read the next question which changes the meaning of what he read before.

THE COURT: You ask this witness whether there was anything that changes the meaning of what she said before but don't read her testimony.

MR. SCHWARTZ: It is my understanding --

THE COURT: That is if a witness is not present. You have a witness on the witness stand. Don't confuse the rulings.

Please get back on the other side of the podium.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q You were asked a moment ago on page 18 beginning

with line 8 the question:

"Question: Were they smoking on the tower?

"Answer: Yes."

Now, was this question right after that asked and did you make this answer:

"Question: Who?"

MR. RUDOFSKY: I object.

THE COURT: Sustained.

Ask her some questions and if she comes out with an answer that is inconsistent you can read her that question and answer.

That is the procedure. You know it as well as I do. You may not read the question to her.

Q Was Debbie smoking?

A No.

Q Was Alan smoking?

A He might have been.

Q I didn't hear the answer.

A He might have been.

THE COURT: Keep your voice up, please.

Q Was there a staircase where you came up into that room?

A Yes.

Q Was that hole near the staircase that you came

up?

A No, it was not.

Q Page 13, line 19.

Were you asked the following questions and did you make the following answers:

"Question: You say the hole. What hole are you referring to?

"Answer: Well, the one that is close to the wall, the hole that Debbie fell through. It is by the staircase. It was supposed to be an escape thing or something. The ladder was not there. There was a hole with nothing under it."

Did you make that answer to that question?

A Yes, I did.

Q Page 17, beginning with line 5, were you asked the following questions and did you make the following answers:

"Question: When you got over the wall, were you on the side of the tower with the hole or on the other side?"

MR. RUDOFSKY: Your Honor, I object to this question. She has not testified to anything having to do with this. She answered the question.

THE COURT: She didn't on direct, but counselor,

the proper way is to ask her again where she went over the wall and so forth, and don't read her testimony unless she has given inconsistent answers.

No, the objection is sustained. Do not read the testimony to her unless she has given you inconsistent answers.

MR. SCHWARTZ: She has. That is what I am trying to do.

THE COURT: What inconsistent answer has she given to you?

MR. SCHWARTZ: She gave an inconsistent answer on the deposition.

THE COURT: You have got to ask her on cross before you can read questions and answers from the deposition.

Q When you got over the wall on what side of the tower were you in relation to the hole?

A The other side, across from it, right across.

Q Was the side that you got over adjacent to it or opposite to it?

A Excuse me?

Q The side that you went over.

A Yes, it was.

Q In relation to the hole, was it opposite or

adjacent to it?

A It was opposite.

Q Were you asked this question and did you give this answer?

"Question: Was it one of the sides adjacent to the side with the hole or the side opposite?

"A Adjacent."

THE COURT: What does the word "it" refer to?

MR. SCHWARTZ: The hole. The previous question gives the hole.

THE COURT: You had better read a couple of questions back. There is no way you can tell from the way you read it there.

Q "Question: On the side with the hole or on the other side?"

THE COURT: What other side?

MR. SCHWARTZ: I have to go back.

THE COURT: Go back far enough so she can understand what you are talking about.

Q "Question: When you got over the wall were you on the side of the tower with the hole or on the other side?

"Answer: I was on this side, I didn't come over that way.

"Question: On the side with the hole or on the other side?

"Answer: Other side.

"Question: Was it one of the sides adjacent to the side with the hole or the side opposite?

"Answer: Adjacent."

A I think it was opposite; it wasn't adjacent.

Q Did you make those answers to those questions at the time of the deposition?

A Yes, I did.

Q Were they correct at the time of the deposition?

A To my recollection then, yes.

Q Was your memory better at the time of the deposition than it is now?

A No, it is old. My memory got better.

Q You say your memory got better with time?

A I guess so.

Q I didn't ask you anything else.

A -- talking about it --

Q I didn't ask you anything else.

On that same point, did you make the following answers to this question:

"Question: It was adjacent? Were Debbie and Alan with you?

"Answer: They were on one adjacent side and I was on the other."

Did you make that answer to that question?

A Yes.

Q Could Debbie have seen the hole from where she was standing?

A I don't know.

MR. SCHWARTZ: That's all.

MR. RUDOFSKY: I have no further questions of the witness.

THE COURT: All right, Miss Gallagher, step down.

Gentlemen, step up here a moment, please.

(Whereupon, a luncheon recess was taken at 1:00 o'clock p.m.)

MR. RUDOFSKY: Your Honor, at this time the defense would like to recall Mr. William Aliff, for the purpose of offering into evidence the original of the disputed document together with the supporting papers.

THE COURT: Please show it to your adversary.

MR. RUDOFSKY: He has seen it during the course of discovery.

THE COURT: Do you have an objection to introducing the two of them together?

MR. SCHWARTZ: Well, I would like to read it first because there may be a question.

MR. RUDOFSKY: He has seen all of it during discovery, your Honor.

MR. SCHWARTZ: I was not present at the discovery.

THE COURT: All right. You take a look and call your next witness and we will decide it.

MR. RUDOFSKY: That presents a problem. The witness is not here. He was told to come at 2:00 o'clock and arrangements were made for him to park in the building. I can only assume he has been delayed in traffic.

THE COURT: Where does he live? Have you called his home?

MR. RUDOFSKY: Not this afternoon.

THE COURT: Get your secretary to call or something.

MR. RUDOFSKY: They are going to call, your Honor.

MR. SCHWARTZ: May we discuss this?

THE COURT: Yes.

MR. SCHWARTZ: I have no objection to the addition, but only to the addition that counsel handed to me.

THE COURT: In other words, you still object to Exhibit D for identification.

MR. SCHWARTZ: Yes, and your Honor may look at it and we can mark it separately.

THE COURT: Mark the addition Exhibit D-1.

MR. RUDOFSKY: I am not offering that, your Honor.

THE COURT: Well, mark it for identification so at least we will know what we are discussing.

MR. SCHWARTZ: I will offer it, Judge.

THE COURT: Wait a minute. He can't offer anything at this moment. At the moment he is offering the entire document, the first part of which has been marked Defendant's Exhibit D and I want to mark the

second part D-1.

MR. SCHWARTZ: I would rather we marked it something else.

THE COURT: Mark it Plaintiff's Exhibit for identification. Do you want to do that?

MR. SCHWARTZ: Yes.

THE COURT: Plaintiff's Exhibit 15 for identification.

THE CLERK: Plaintiff's Exhibit 15 for identification.

(So marked.)

THE COURT: This is Mr. Daniels' portion of the report.

MR. RUDOFSKY: Now, that is the problem, your Honor's comment which is why I would like to put the witness on the stand.

THE COURT: This alleged portion?

MR. RUDOFSKY: It is underlying documentation.

MR. SCHWARTZ: Could you separate the two?

THE COURT: No, don't separate the two. Leave them together.

What is your exhibit now?

THE CLERK: D-1 for identification.

(Document marked D-1 for identification.)

THE COURT: What is your objection to Defendant's Exhibit D now that you have the entire document?

MR. SCHWARTZ: If your Honor will look at Plaintiff's Exhibit --

THE COURT: My question is, what is your objection to it?

MR. SCHWARTZ: The objection is that the statement and the report of D-1 is not borne out by Exhibit 16, Plaintiff's Exhibit 16 in evidence.

THE COURT: Do you want to put Mr. Aliff back on and acrosss-examine him?

MR. SCHWARTZ: Yes, if your Honor is going to admit it.

THE COURT: I'll allow that. If that is what you want to do, you can recall and ask what questions you want.

MR. RUDOFSKY: Is it admitted into evidence?

THE COURT: Recall the witness, Lt.-Commander Aliff.

L T . - C O M M A N D E R W I L L I A M A L I F F , called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: You are under oath.

DIRECT EXAMINATION

BY MR. RUDOFSKY: (Continuing)

Q Mr. Aliff, I am handing you a document entitled, "Record of Proceedings."

THE COURT: Don't read from it.

Defendant's Exhibit D and D-1 for identification.

MR. RUDOFSKY: If your Honor pleases, the second portion has been marked Plaintiff's Exhibit 16 for identification.

Q Are you familiar with these documents?

A Yes, sir.

Q Would you explain to the Court what they are, please?

A This is the document --

MR. SCHWARTZ: Did you identify the exhibit?

THE COURT: Yes, he has already identified it Defendant's D is 16 for identification, the two pages. Is that the document you referred to that was prepared by Lt. Daniels?

THE WITNESS: What page is that?

MR. RUDOFSKY: Would you explain to the Court --

THE COURT: Is that the document that Lt. Daniels prepared?

THE WITNESS: The whole thing, your Honor.

THE COURT: Yes, you don't have to tell me what they are. It is a simple answer, yes or no.

THE WITNESS: From Lt. Daniels' office.

Q Now, Commander, you just said that they were forwarded to you by Lt. Daniels; is that correct?

A I said that, yes, sir.

Q Is that what you meant this morning when you said that he had prepared a report for you?

A That was the contention I was trying to come up with, yes, sir.

Q Were any of these documents, as far as you know, actually prepared by Mr. Daniels himself?

A No, sir.

Q These are the original documents forwarded to you?

A Yes.

Q On which your report is based?

A Yes.

Q Was it part of Mr. Daniels' responsibility to forward these documents to you?

A As part of the collection of information, yes, sir.

Q Was it part of your responsibility to make up the report which is now labeled Defendant's Exhibit D for

identification?

A Yes, sir.

Q Did you in fact make up that report?

A I did.

MR. RUDOFSKY: I now move --

THE COURT: Wait a minute. Is this a document that is normally prepared in the regular course of business by the Coast Guard, both documents?

THE WITNESS: One would be a collection of facts.

THE COURT: Are these documents, Defendant's Exhibit D and Plaintiff's Exhibit 16 both marked for identification, documents prepared in the regular course of business by the Coast Guard?

THE WITNESS: On an investigation, yes, sir.

THE COURT: They are.

MR. RUDOFSKY: Your Honor, I move these into evidence at this point.

THE COURT: What is your objection?

MR. SCHWARTZ: Is he moving for both documents? No objection.

THE COURT: No objection. Please proceed. He wants to cross-examine him.

MR. RUDOFSKY: I am sorry.

THE COURT: Give them to the Clerk so he can

mark them for identification.

THE CLERK: Both 15 and D are received in evidence.

(So marked.)

THE COURT: What is the word on him?

Go ahead, Mr. Schwartz.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q Do I understand now that Plaintiff's Exhibit 16 in evidence, which is the addition that you brought Defendant's Exhibit D in evidence, was what your report was based on?

A Yes, sir.

Q Are there any papers missing from this Plaintiff's Exhibit 16 that you based your report on?

A I would have to say no, but I could not be sure, sir.

Q The statements listed under findings of fact, under your signature, that is what is your conclusion; is that correct?

A I'd have to say that, yes, sir.

Q So that there is no misunderstanding, you based it on Lt. Daniels' papers which are attached here?

A The reports he forwarded.

MR. SCHWARTZ: That is all.

REDIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Mr. Aliff, is your testimony that you based your reports exclusively on the papers appended to it or did you also take into consideration --

MR. SCHWARTZ: I object. It is already answered.

THE COURT: No, I'll allow it.

Q -- other information which you may have been privy to?

MR. SCHWARTZ: I object.

THE COURT: I'll allow it.

Is your report based exclusively on Exhibit 16?

THE WITNESS: Also on verbal conversations.

THE COURT: With whom?

THE WITNESS: With Mr. Daniels.

THE COURT: Do you want to object to the admission of the report?

MR. SCHWARTZ: Let me put it this way: I have no objection to what I put in evidence which is Exhibit 16. My only objection goes to Exhibit D for the defendant.

THE COURT: What you are really saying is you

object to the weight the Court gives to Exhibit D. Do you want to exclude Exhibit D on the ground that it is based on verbal hearsay?

MR. SCHWARTZ: Yes.

THE COURT: Then he is going to withdraw Plaintiff's Exhibit 16.

MR. SCHWARTZ: No.

THE COURT: You are not, but he is.

MR. RUDOFSKY: I am not going to sponsor it. May I be heard on this?

THE COURT: No, you cannot introduce something based on testimony of someone who is not here.

(continued next page)

MR. RUDOFSKY: We have the testimony before the Court in the form of the deposition.

THE COURT: No, we do not. How can he cross-examine?

MR. RUDOFSKY: He had an opportunity to do that during the deposition and secondly, I think that it is a business record and it is admissible.

THE COURT: Not when it is based on hearsay.

MR. RUDOFSKY: If Lt. Daniels was under a business duty to report it.

THE COURT: Have you ever heard of the Johnson v. Lutz rule?

MR. RUDOFSKY: I can't say I have.

THE COURT: The Court of Appeals and even the new rules do not allow it in a matter of this kind. If he objected on the ground that conclusions based on what somebody else told him he is entitled. That is a good objection regardless of whether it was kept in the ordinary course of business. Read Johnson v. Lutz.

MR. RUDOFSKY: I have nothing more.

THE COURT: You may step down.

MR. RUDOFSKY: The defense now calls Victor Behrend.

V I C T O R B E H R E N D , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q State your name for the record.

A Victor Behrend.

Q How old are you, Mr. Behrend?

A I am 20 going on 21.

Q Where do you reside?

A At the present?

Q Yes.

A In Patchoque.

Q What is your occupation?

A My occupation is I am in the life insurance business.

MR. SCHWARTZ: What?

THE WITNESS: life insurance agent.

Q Did there come a time on June 24, 1972, when you were present at the Coast Guard tower at Democrat Point, Fire Island, New York?

A Yes, I was with the girl and Alan Peers and Bob Castelli and I think there were two other girls besides the one that fell.

Q When did you arrive at Fire Island on June 24, 1972? Approximately?

A That is kind of difficult. It was a long time ago. I would say maybe a little bit before noon or noontime, around there.

Q Who were you with at the time of your arrival?

A I think I was with Alan and Bob Castelli.

Q When you say Alan, are you referring to Alan Peers?

A I don't remember if I came with both of them. I know I came with one or the other.

Q After you arrived, what did you do and who did you do it with?

A Well, I think we went in the water first and then we came out or something.

MR. SCHWARTZ: May we identify "we," your Honor?

THE COURT: Who are you talking about? Castelli and Alan and you?

THE WITNESS: Yes.

And when we got out of the water we went up to the concession stand and then Alan ran across some girls that he knew from school.

Q This was on the beach?

A Yes, this was on the beach.

Q How far from the tower were you at this time?

A Well, we were like considering we were on the beach at field 2 and the tower from field 2 is I would say is a good mile and a half.

Q Did there come a time when youwalked or otherwise transported yourself toward the tower?

A We were walking along the beach.

Q Who are you referring to?

A All of us, including the girls.

Q Could you go through the names so the Court has them?

THE COURT: He has already given the names.

Q You all left together?

A Right.

Q Were you talking one to the other as you were walking?

A That's kind of hard to say. I really don't recollect.

Q At any event, did there come a time when you all arrived at the tower?

A Yes.

Q Did you climb the tower?

A Yes, I did.

Q Who else climbed the tower?

A Alan Peers.

Q Anybody else?

A Bob Castelli was down on the ground with one of the girl friends.

Q What did the other two girls do?

A The plaintiff and I think -- I can't be positive because this is going back a couple of years -- I think there was another girl up there but I can't be positive. She might have been down.

Q Do you recall anyone smoking during the time?

MR. SCHWARTZ: I object. Leading the witness.

THE COURT: No. It is not leading.

MR. SCHWARTZ: You can ask them what they did.

THE COURT: Do you recall anybody smoking at the time you went up or when you got up to the top of the tower?

THE WITNESS: Yes, I think I was smoking. And maybe Alan was smoking.

MR. SCHWARTZ: May I get the names?

THE COURT: Behrend and Alan both smoking.

Q Did there come a time when all four of you were at the top of the tower inside of the watchtower?

A Yes, because the only way to get up there was -- actually the stairway was more like a fire escape going back

and forth -- and we were directly in the center on the top.

Q What happened when you reached the top of the tower?

A To my knowledge that I can remember now I may have given youmore detail in the deposition, but to the best of my knowledge we were up in the tower and we were inside and there was like a square opening where there was usually, should have been a board there, I guess, or maybe it was an emergency opening out to the catwalk and you can go under and get out to the catwalk and you can walk around.

Now, the only thing I remember is that I was standing, I walked around a couple of times and we were smoking a cigarette.

THE COURT: Walking around where, the catwalk or outside?

THE WITNESS: I walked around outside.

THE COURT: On the catwalk?

THE WITNESS: A couple of times, I really can't be specific but I did see the manhole.

Q Would you repeat that?

A I did see the hole because I stepped right over it. Alan was inside, he wasn't on the catwalk. He was actually inside but he was leaning against the wall facing the catwalk and if you were to say that this is the catwalk,

this is the tower, I would be facing on the northeast corner of the tower.

Q Perhaps you will do it on the blackboard as we have done with the other witnesses.

MR. SCHWARTZ: May we turn it around?

THE COURT: You will have to.

Q Now, if you would approach the blackboard --

THE COURT: Assume that the ocean is on the south side at the bottom of that picture and that the north side is the top part. To the right is the east and to the left is west.

THE WITNESS: In other words, this is south (indicating).

THE COURT: Now, you say you were in the northeast corner?

THE WITNESS: This drawing is wrong. It was more long one way and short the other way. I guess it has no significance.

I was approximately here (indicating).

THE COURT: Will you put an X.

Q Where was the opening in the catwalk?

A The opening in the catwalk?

Here (indicating).

THE COURT: Putting an O on the south side.

Q Would you put a B where Miss Barth was?

MR. SCHWARTZ: May we have him pinpoint where he is referring to?

THE COURT: On the northeast corner.

THE WITNESS: She was, I can't be positive.

MR. RUDOFSKY: To the best of your knowledge.

THE WITNESS: I think she was here.

THE COURT: Right alongside of you? And Alan was here? (indicating)

Just on the inside of you?

Q To the best of your knowledge was anyone else up on the tower with you?

A No.

Q Now, starting from those positions would you explain what happened?

A If I remember.

THE COURT: To the best of your knowledge.

A I think Alan had a cigarette.

Q Excuse me?

A I think Alan is the one who had a cigarette. It could have been me but now I am not too positive, but I am pretty sure that Alan did have the cigarette at the time because I think we only had one cigarette and we were splitting it between the two of us.

There is an opening like a half wall and I think she --

Q Who is "she," Debbie Barth?

A Yes, she took the cigarette out of Alan's hand and started running like playing a game, like running around the catwalk. I proceeded knowing that she was running toward the catwalk.

Q Was she on the catwalk?

A No, she was on the catwalk. I was running after her to stop her and I was saying stop, there is a -- and then she was through before I had a chance. It happened too fast for me to prevent it from happening.

MR. RUDOFSKY: We have no further questions of this witness, your Honor.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q You stated that you were on the northeast corner or near the northeast corner?

A Yes.

Q So that the whole was on the southerly side?

A Yes, sir.

Q And that the plaintiff, Debbie, was on the east side?

A To my best recollection, yes.

Q She wasn't standing on the south side next to the hole, was she?

A No, I don't think so.

Q You saw her move on the easterly side?

A Going to the south side.

Q Toward the south?

A Yes.

Q And when she was going toward the south, where was Alan?

A Now I don't know if he attempted to go out on the catwalk also at that time. I can't say because I can't recollect.

As far as I know, he was inside, but I don't know what happened at the time that she was running. It happened in such a second or two --

Q In any event, when she was moving towards the south, he was not on the catwalk?

A To the best of my knowledge, no.

Q And you would not remember whether a girl by the name of Eileen Gallagher was up there?

A No, it has been so long.

Q In any event, as Debbie Barth was moving down on the east side to the south she was not talking to any girl, was she?

A Not that I can remember. It is hard to say because I haven't -- I gave the deposition last year and that was fairly in detail and as far as this year is concerned, I only remember segments, basically generally what happened.

Q When she was moving down on the east side of that catwalk to the south, was she talking to anybody?

A She said, I can't be positive, she might have been talking to Alan.

Q By the way, was it breezy up there?

A That day, no.

Q No?

A Not that I can remember, it was not windy.

Q Not windy, was there a breeze blowing?

A Maybe a very slight breeze.

Q Had you been up in this tower before?

A Before that incident? Yes, I have.

Q About how many times?

A I would say about five times.

Q And when you were at this tower, did you see any other children there?

A Yes.

Q Did you see any of them at any time on the stairs

A Yes.

Q At any of the times that you were there did you

see any signs?

A I don't know about any of the times if I saw the sign. At that time there was no sign.

MR. RUDOFSKY: Your Honor, could the witness make it clear which time is that time?

A At the time of the accident.

Q Was there any fence or obstruction around that tower at any of the times that you were there?

A To the best of my knowledge, no.

Q About over what period of time would you say you have been to that tower prior to the accident?

A I would say a year before that, a year before, probably would be 1971 or maybe '68, '69, during those years.

THE COURT: '68, '69, '70, '71?

THE WITNESS: Yes, it was more or less.

THE COURT: I don't want your musings. I want your best recollections as to what years you had been there.

THE WITNESS: I really couldn't say exactly what years but I could say I used to go to Fire Island and quite often since I lived around the area.

THE COURT: Had you been there the year before?

THE WITNESS: It is very possible. Let's put it this way, he is asking for dates and years and I

can't.

THE COURT: The year before is 1971.

THE WITNESS: I would say 1971, I was there once.

THE COURT: Any other time prior to that?

THE WITNESS: Yes, but I don't remember what years; to be exact it could be between 1968 and 1971.

Q So that 1971 would be approximately the time before you were there?

A Yes.

Q Did you notice any signs there, to the best of your recollection?

A Not that I can remember, no.

Q When you went up there on this occasion , then, you knew about the hole being there on the catwalk?

A Yes, I would say so, yes, sir.

But I would say, though, that it didn't stick out in my mind, okay.

Q Do you recall who went up the ladder first?

A No, I don't.

Q Did you go up there before Alan?

A I really couldn't answer that because I don't remember.

Q Did you have cigarettes of your own up there?

A I don't think so, up there.

Q Pardon me?

A I don't think we had cigarettes up there. I think we only had one or two up there.

Q Who had the cigarettes?

A It could have been Alan or me. I don't remember.

Q Do you remember testifying that Alan went down for cigarettes?

MR. RUDOFSKY: Your Honor, I must object to that question.

Where does he get this "Do you remember testifying?"

THE COURT: Strike it.

Did you ever say that anyone, that Alan went down to get cigarettes?

THE WITNESS: I might have put it in my deposition. I didn't have a chance to look over it to refresh my memory of exact details.

THE COURT: All right.

Q Page 29.

MR. SCHWARTZ: May I show it to the Court first so the Court will understand in order for me to ask the question? It is the last one there. I don't want to violate any rules of the Court.

THE COURT: You want to ask the last question?

MR. SCHWARTZ: Yes.

Would it be permitted just to read an answer and ask him if he made the statement?

THE COURT: You can ask him but you have to go back to the beginning of line 2; otherwise, he is not going to know what you are talking about -- you have no question all the way back to line 2.

MR. SCHWARTZ: That is why I was wondering if he just made that answer.

THE COURT: No, you have got to ask him if he made this answer to this question.

MR. SCHWARTZ: I will come back to line 2, your Honor.

Q Page 29, line 2.

"Question: Was there anyone saying anything to anyone during that period of time, and if so, what?

"Answer: Nothing that I could remember was said. Maybe just look at the view, maybe that word was just applied.

"What actually happened when I got up to the top of the tower, we were all standing aside and looking at the view and there was a catwalk on the other part of the enclosure and I would say maybe about two and a half or three feet wide, just enough

to walk on. There was a railing and I decided to hop out onto the catwalk and walked once around. I did notice that there was like a little manhole there.

"Question: On the catwalk?

"Answer: Yes, I guess once there was a hatch there, an emergency exit, and in other words, say if there is a fire I guess inside the enclosure there and it was beneath them that they could not get out and that there is no possible way, and the only other way to get out would be on the catwalk and down the emergency ladder which is a straight ten foot ladder, about.

"Question: Yes?

"Answer: What happened was as far as my knowledge, I had walked around, I had come back inside and Alan Peers was up there and he went down the stairs to get the cigarettes. He climbed all the way down to get the cigarettes.

"Question: Yes?

"Answer: I am not the most positive on that. He had to come back upstairs with the cigarettes."

Did you make those answers to those questions?

A I did, and they are accurate.

Q On page 46, beginning with line 23, did you

make the following answer to these questions:

"Question: You were standing?"

"Answer: Yes, in the corner or northeast corner.

"Question: Please try to identify these areas that you are now speaking of.

"Answer: I was standing on the northeast corner and she was like in the southeast corner, here, and on the southerly part of the catwalk."

Did you make those answers to those questions?

A If I said it in a deposition, yes.

Q Were they true?

A Yes.

MR. SCHWARTZ: That is all of this witness, your Honor.

REDIRECT EXAMINATION

BY MR RUDOFSKY:

Q Mr. Behrend, at the time that you testified, Mr. Peers wanted to get cigarettes back from Miss Barth?

A Yes.

Q Did she anything to him?

MR. SCHWARTZ: I object as being improper redirect.

THE COURT: Overruled.

A Did she say anything to Alan?

Q If you can recall.

A I really can't.

MR. RUDOFSKY: Your Honor, with your permission I would like to show the witness part of his deposition for the purpose of refreshing his recollection.

THE COURT: Is it inconsistent? Is it inconsistent with what he did say then?

Read the question and answer.

MR. SCHWARTZ: May we approach the bench and see if it is inconsistent?

THE COURT: Show it to him.

I'll allow it.

MR. SCHWARTZ: May I have the page?

THE COURT: Page 44, line 24.

Q During the course of your deposition, were you asked the following questions and did you give the following answers --

MR. SCHWARTZ: Wait. He said he was only going to ask the witness if it refreshes his recollection?

THE COURT: No, the proper way is this.

Q "Question: Now, wait a minute, they were talking to each other?

"Answer: Yes, sir, they were talking to each other.

"Question: That is through the open window or what?

"Answer: Yes.

"Question: Okay, continue.

"Answer: Debbie had a cigarette and she did start to -- she said something, I don't remember the exact words, but she said you can't have it or something like that, playing a foolish game."

MR. SCHWARTZ: I object. This is a conclusion.

THE COURT: Stop it at "you cannot have it."

Do you recall giving those answers to those questions?

THE WITNESS: Yes, I can now.

THE COURT: Were these true at the time? Are they true now?

THE WITNESS: Yes.

Q Is there any doubt in your mind that from your vantage point that you have testified to that is the north-east corner of the tower, that you saw Debbie Barth running on the catwalk?

MR. SCHWARTZ: I object to that.

THE COURT: Overruled.

THE WITNESS: Excuse me?

That is exactly the way I explained it and that

is the way it happened.

MR. RUDOFSKY: No further questions, your Honor.

RECROSS-EXAMINATION

BY MR. SCHWARTZ:

Q She had moved south?

A Yes.

Q On the easterly side?

A Yes. It could have been south as you read in the deposition. You said southeast. It is south.

Q Just answer the question.

When she was moving south she was on the east side of the house or whatever you want to call it, is that right?

A Yes, I would say so, yes.

Q And as you testified, you were on the northeast corner and she was like in the southeast corner on the south part of the catwalk?

A Yes, that is true. South, southeast, it does not necessarily mean --

Q Mr. Witness, do not put interpretations on. Just answer the question.

A I know.

Q All right. That is all.

MR. RUDOFSKY: We will excuse the witness,

your Honor.

THE COURT: Mr. Behrend, think back. This is in July of 1972.

THE WITNESS: Yes.

THE COURT: What date was it, again, do you remember?

THE WITNESS: July in 1972.

THE COURT: Do you remember the date?

THE WITNESS: No.

MR. RUDOFSKY: Excuse me, it was June.

THE COURT: June 24, 1972 was the date of the accident.

THE WITNESS: Right.

THE COURT: Do you recall ever being at that tower before June 24th in 1972?

THE WITNESS: Not that I can remember.

THE COURT: So that your immediately preceding time was in 1971.

THE WITNESS: Most likely, yes. The tower seemed to be a very catching place.

THE COURT: You were there. Did you go up the tower in 1971?

THE WITNESS: I might have and I might not have.

THE COURT: Had you ever been up the tower

before that?

THE WITNESS: Yes.

THE COURT: And the occasion that you went up on the tower before June 24, 1972, was that manhole cover, as you described it, uncovered?

THE WITNESS: That I could not answer because I don't remember.

THE COURT: You don't remember? All right.

You may step down.

Step up, gentlemen, please.

(Whereupon, the trial was adjourned to August 28, 1975 at 10:00 A.M.)

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

BARTH, :

Plaintiff, :

-against- : 74-C-74

UNITED STATES OF AMERICA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

August 28, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

DIANNA LANDSMAN
ACTING OFFICIAL COURT REPORTER

Appearances:

HARRY R. SCHWARTZ, ESQ.
Attorney for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD RUDOFSKY, ESQ.
Of Counsel

MR. RUDOFSKY: Your Honor, the defense calls as its next witness Rosalie Rozzo.

THE COURT: Do you have your witness here?

MR. SCHWARTZ: Yes, sir.

THE COURT: Did you conduct the deposition yesterday?

MR. RUDOFSKY: If I may say, Miss Rozzo is here with her mother and they have to be back home early today. I would be more than happy to let Mr. Peers go next.

THE COURT: All right.

R O S A L I E R O Z Z O , called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q State your name, for the record.

A Rosalie Rozzo.

Q Miss Rozzo, would you please state your address for the record?

A 616 Everdale Avenue, West Islip, New York.

Q Are you a student?

A Yes.

Q What school do you attend?

A West Islip High School.

Q How old are you?

A 17.

Q When were you 17?

A December 19th.

Q December 19, 1974?

A No, yes.

Q Did there come a time on June 24, 1972, when you accompanied a group of people to the Coast Guard tower at Democrat Point on Fire Island?

A Yes.

Q What people made up that group?

A Debbie, Alan, Eileen, Bob, Victor and I.

Q Do you know the last names of any of those persons?

A Debbie, Eileen's and Alan's.

Q Tell the Court.

A Alan Peers, Debbie Barth, Eileen Gallagher.

Q Did there come a time on June 24, 1972, when some of that -- any or some -- of that group climbed the Coast Guard tower?

A Yes.

Q Who climbed the tower?

A I think everybody but Bob and Eileen.

Q When you say you think, with respect to yourself, are you sure of whether you climbed the tower or not?

A Yes. I was sitting on the grass with Bob.

Q You did not climb the tower?

A Yes.

Q Is there a reason you did not climb the tower?

MR. SCHWARTZ: Objection.

THE COURT: I don't see why her reason would be material.

MR. RUDOFSKY: It is material, your Honor, in one of the elements in the cause of action whether a person of this age would be able to appreciate the dangers.

THE COURT: I understand, but that does not --

MR. RUDOFSKY: I am attempting not to lead her.

THE COURT: I understand. I will take it and consider what weight to give it.

I am not so sure that that fulfills that function. I will take the testimony.

Q Would you answer the question?

A I didn't want to climb up.

Q Do you recall any specific reason?

A I just didn't want to climb it.

Q I see. Could you describe for the Court how far

you were from the tower at the time you were sitting on the ground?

A About the width of the courtroom to the base.

MR. SCHWARTZ: After the word "about" I didn't get it.

THE COURT: About the width of the courtroom to the base of the tower. The courtroom is thirty-eight feet six inches in length. Is that about right?

THE WITNESS: Yes.

MR. RUDOFSKY: How many feet?

THE COURT: 37, 38 1/2 feet; about the width from that wall to that wall is where she was from the base of the tower, 38 1/2 feet.

Q Would you tell the Court what you were doing while you were sitting on the ground?

A I was talking to Bob, that was about it.

Q At any point did you look at the tower?

A Yes, every once in a while I would glance up.

Q At any point did you see the four people who climbed the tower?

A Yes.

Q What did you see with respect to those people?

A Nothing particular. They were all up on the tower.

Q When you say all up on the tower, were they all up on the tower?

A Yes, sir, on the catwalk.

Q Excuse me.

A On the catwalk.

Q When you say all of these people at the catwalk, what did you see?

A I can't remember, you know, at any particular thing they were doing.

Q Did you see Miss Barth fall?

A Yes.

Q Did you see what she was doing immediately before she fell?

A She was running.

Q Would you explain to the Court what you mean by running so there is no confusion.

A She wasn't taking large sliding steps, like a short-paced run.

Q Was she facing forward?

A I can't remember.

THE COURT: Was she running backward?

THE WITNESS: No.

THE COURT: She was running forward?

THE WITNESS: Yes.

Q Did you hear anything while you were sitting on the ground?

A They were laughing.

Q They, who are we talking about?

A I can't say who, exactly.

Q Where was the laughter coming from?

A From the catwalk.

Q And you were sitting approximately thirty-eight feet away from the base on the ground?

A Yes.

Q Are you sure that you heard laughter?

A Yes.

MR. RUDOFSKY: I have no further questions of this witness, your Honor.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

THE COURT: Miss Rozzo, do you think your mother is hearing your testimony from the witness stand?

THE WITNESS: No.

THE COURT: Talk loud enough so she can hear you.

Q Miss Rozzo, had you ever been to the tower before?

A No, it was my first time.

Q Do you know anyone who had been to the tower before?

A Yes, most of my friends.

MR. RUDOFSKY: I object t this line of questioning and ask the witness' answer be stricken.

THE COURT: Sustained. Granted.

MR. SCHWARTZ: Could I make her my witness for the purpose of this question?

THE COURT: It is the hearsay nature of the question. It is not whether it is proper cross-examination. It is hearsay as to whether she heard from somebody else whether they had been there.

MR. SCHWARTZ: I asked her whether she knows.

THE COURT: How else is she going to find out?

Q Isn't it true that you stated you were sitting about ten or twelve feet from the tower?

A I have no idea of distance. It was such a long time ago.

Q Page 15, line 23, did you make the following answers to the following questions:

"Question: Could you estimate about how far you were from them?

"Answer: I don't know how far I was from the

base. I was not that far at all. I think maybe ten to twelve feet."

Did you make those answers to those questions?

A Yes, I did.

Q Were they true when you made them, just yes or no?

A They were true. I don't know if they are true.

Q When you made those answers.

A I thought they were.

Q Were you sworn before a Notary Public?

A Yes, I was.

Q Did you swear to tell the truth?

A I didn't have a yardstick, --

Q Did you swear to tell the truth at that time?

A Yes, I did.

Q And at that time when you answered the question did you intend to tell the truth?

A Yes, I did.

Q And at that time did you make those answers to those questions?

A Yes, I did.

Q Isn't it a fact that you did not see what was going on until you saw Debbie falling?

A Yes.

Q Isn't it likewise true that it was like a flash and you really don't remember too much about it?

A I remember the fall.

Q Now, you stayed below. With whom did you stay below? Who was that? What was the name of the party again?

A Bob.

Q You engaged in a conversation with Bob; is that correct?

A Yes.

Q You were talking to Bob and Bob was talking to you?

A We were both talking to each other.

Q Did Debbie scream?

A No.

Q At the time of this examination --

MR. RUDOFSKY: Your Honor --

MR. SCHWARTZ: Page 20.

Q Were you asked this question and did you make this answer:

"Question: Did she scream?

"Answer: I don't remember anything."

Did you make that answer to that question?

A Yes.

Q Was it true at the time you made it?

A Yes.

MR. SCHWARTZ: That is all.

REDIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Miss Rozzo, Mr. Schwartz read you a question and answer from your deposition and in response to the question that he posed to you you indicated that you have no idea of distance. Would you explain what you mean by that?

MR. SCHWARTZ: I object to the question. Improper.

THE COURT: Overruled.

Q When you told Mr. Schwartz you had no idea of distance, what did you mean by that?

A I have no idea of distance. I went home and we went over the distances.

MR. SCHWARTZ: I object to what she did when she went home.

A My father showed me what ten to twelve feet is.

MR. SCHWARTZ: Your Honor, I am going to object to that. I don't have a father here to cross-examine.

THE COURT: No, it is not the question. I will allow the explanation. It is not being offered to what the truth of what the father asserted is. It is being offered as to how she knew she didn't know

anything about distance.

A He showed me what ten to twelve feet was and that was not the distance.

MR. SCHWARTZ: I can't hear. Could I move up a little bit?

THE COURT: If you can't hear, ask her to repeat it. Sit where you are. Raise your voice so your mother can hear the answer.

Q Now, you also told Mr. Schwartz that you didn't see anything until you saw Debbie falling. Did you see anything before Debbie fell?

A Just glimpses.

Q What did you see?

MR. SCHWARTZ: I object. Improper redirect.

THE COURT: Overruled.

A Up on thecatwalk, nothing like I could describe, just general things.

Q Did you see her moving?

MR. SCHWARTZ: Objection, leading.

THE COURT: Overruled.

A Standing around and then before she fell she was doing a slow jog.

Q Are you sure you saw it?

MR. SCHWARTZ: Objection.

THE COURT: Overruled

Q You saw her doing a slow jog?

MR. SCHWARTZ: Objection to counsel repeating the testimony.

THE COURT: Overruled.

MR. RUDOFSKY: No further questions.

RECROSS-EXAMINATION

BY MR. SCHWARTZ:

Q When did you have this conversation with your father?

A Right after my deposition.

Q Is that the only thing you spoke to your father about?

A No. We went over what was said. He was there with me.

Q Why did you ask your father the distance of ten or twelve feet?

MR. RUDOFSKY: I object. She has not testified she asked her father.

THE COURT: I'll allow it.

A I don't think I asked him. I think it just came up.

Q Tell me exactly what was said.

THE COURT: Tell him to your best recollection

and substance what was said.

A I couldn't say. I just know we got on the subject of distance and he asked me if I was sure that was it.

Q Was that of such great importance to you?

MR. RUDOFSKY: I object, your Honor.

THE COURT: Overruled.

A It was not of such importance. I just wanted to make sure my statement was as accurate as I can be.

Q Is that the only thing that bothered you about your testimony in the deposition?

A It didn't bother me. I just wanted to make sure. I didn't walk out of there saying I'd have to go home and measure ten to twelve feet.

Q Did you say at the deposition you didn't know what ten or twelve feet was?

MR. RUDOFSKY: Your Honor, Mr. Schwartz has the deposition.

MR. SCHWARTZ: This is cross.

THE COURT: I understand. Overruled.

A I don't know.

Q Well, if you didn't know what ten or twelve feet was, why did you say that at the time of the deposition?

A I don't know.

Q Now, isn't it a fact that somebody came to your

home and spoke to you about that ten or twelve feet?

A Yes.

Q And isn't it a further fact that you were told you couldn't possibly see the people on the catwalk ten or twelve feet away?

A I also told that man --

Q I didn't ask you what you told. I asked you were you told that?

A Yes, I was.

Q And was it after that that you decided you were further away?

A No, it was after the deposition that I was further away.

Q So that you say you had that thought in mind before this person came to you and told you you couldn't see at the top of the catwalk at ten or twelve feet away?

MR. RUDOFSKY: I object.

THE COURT: In light of her testimony, she has not said when that person came in relationship to the deposition.

MR. SCHWARTZ: My question is not clear to the Court.

(continued next page)

THE COURT: As I recall her testimony, Miss Rozzo has not testified as to when the person came, either before or after the deposition. Your question presupposes that fact.

MR. SCHWARTZ: I stand corrected. I agree with the Court.

Q That person who came to you, was that before or after the deposition?

A After.

Q So then are you telling the Court now that you were troubled and concerned about that ten or twelve feet before the party came to you and stated that you couldn't see up the catwalk if you were ten or twelve feet from the base of the tower?

A I was not overly concerned. I just wanted to make sure it was accurate.

MR. SCHWARTZ: All right.

REDIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Miss Rozzo, when you testified at the deposition that you were ten to twelve feet from the base of the tower, did you actually know how far ten or twelve feet was?

A No.

Q Do you actually know how far thirty-eight

feet is?

MR. SCHWARTZ: I object to the question.

THE COURT: She knows now because I told her.

Q Aside from Judge Platt telling you, would you have any idea how much it is?

A No.

Q Is that your testimony?

MR. SCHWARTZ: I object to his repeating testimony.

THE COURT: No, I'll allow it.

Q Is it your testimony that you were approximately away from the tower the same that the width of this courtroom is?

A Yes.

MR. SCHWARTZ: I object to that.

THE COURT: Sustained.

MR. RUDOFSKY: No further questions, your Honor.

MR. SCHWARTZ: That's all.

THE COURT: Thank you, Miss Rozzo.

MR. RUDOFSKY: May I have a moment, your Honor?

THE COURT: Yes.

MR. RUDOFSKY: Your Honor, as I understand it, the Plaintiff now wishes tocall Mr. Peers.

THE COURT: All right. Is that the fact,

Mr. Schwartz? Do you wish to call Mr. Peers?

MR. SCHWARTZ: Yes.

A L A N P E E R S , called as a witness, after having been first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q State your name for the record.

A Alan Peers.

Q Mr. Peers, how old are you?

A 19.

Q On June 24, 1972, did you go to the tower at Democrat Point with Debbie, Rosalie, and Bob?

MR. RUDOFSKY: I object to him leading. The witness can testify who was with him, if anybody?

THE COURT: Yes, you have been quite critical of the opposition leading. Try to conform yourself.

MR. SCHWARTZ: I could do that.

THE COURT: Don't lead.

Q You say you went to the tower?

THE COURT: I haven't heard him say anything yet. Did you go to the tower?

A Yes.

THE COURT: With whom?

THE WITNESS: Debbie Barth, Eileen Gallagher, Victor and Bobby.

Q Had you been to the tower before June 24, 1972?

A Yes, sir.

Q About when was the first time you were there?

A About 1961.

THE COURT: 1961?

THE WITNESS: Yes, sir.

THE COURT: When were you born?

THE WITNESS: 1956.

THE COURT: You were five?

THE WITNESS: Five or six.

Q Who did you go there with?

A The first time I went?

Q Yes.

A My father.

Q About how many times had you been to that tower altogether?

A I'd say a good two hundred times.

THE COURT: Prior to the accident?

THE WITNESS: Yes, sir.

Q Now when you went to the tower did you go up to the tower to the catwalk?

THE COURT: When are we talking about? When he

was five?

MR. SCHWARTZ: Yes.

THE COURT: When he was five years of age?

On that first time in 1961 when you went to the tower, did you go up to the catwalk?

THE WITNESS: No.

Q When you first went up the tower, about how old were you?

MR. RUDOFSKY: Objection, your Honor.

THE COURT: Sustained.

When did you first go up the tower?

THE WITNESS: 1961, 1962.

THE COURT: You did go in 1961? Just not on the first time you went with your father?

THE WITNESS: My dad told me don't go up there.

THE COURT: The first time you went there with your father he said don't go up?

Later on that summer you went up?

THE WITNESS: Yes, sir.

THE COURT: At five. All right, you went up the tower in 1961 without your father.

THE WITNESS: No, Dad was always with me.

THE COURT: He went with you?

THE WITNESS: Yes.

THE COURT: Did he go up with you?

THE WITNESS: Yes, sir.

Q When you went up with your father --

THE COURT: Was the Coast Guard there in 1961?

THE WITNESS: At the tower when we went up?

No, sir.

THE COURT: The tower wasn't in use by the Coast Guard then?

THE WITNESS: No, sir, it was just the way it is.

THE COURT: All right. The gentleman from the Coast Guard -- you were here yesterday?

THE WITNESS: Yes, sir.

THE COURT: And the gentleman from the Coast Guard said they used it in 1968.

You heard him say they were using it up until 1968. You never saw them using it?

THE WITNESS: No, sir.

THE COURT: Did your father know they were using it?

THE WITNESS: He never said anything about it.

Q Now, when you went up there with your father, the first time, did you notice any hole in the catwalk?

A Yes.

MR. RUDOFSKY: I object. Can he make it clear?

THE COURT: It was 1961, the first time you went up the tower you noticed the hole?

THE WITNESS: Yes, sir.

THE COURT: Was there a ladder, do you know, from the catwalk?

THE WITNESS: I don't remember a ladder.

THE COURT: Just a hole? Was it open?

THE WITNESS: Yes, sir.

THE COURT: In 1961?

Q About when before the occurrence of June 24, 1972, was the last time, prior to that, that you went up to the catwalk?

A I'd say two weeks, three weeks, maybe.

THE COURT: Wait a minute. During this period of time from 1961 to 1972 in the two hundred visits to the tower, did you go up each time?

THE WITNESS: Most every time, yes, sir.

Q When you went up there, what did you say, a couple or a few weeks before?

A About two weeks before.

Q About two weeks before did you see the hole there?

A Yes, sir.

Q Now between the time that you first went up and saw the hole and the time of about two weeks before the

occurrence that you went up and saw the hole on the various occasions that you went up there, did you also see that hole?

A Yes, sir.

Q Now, at the time that you went to the tower any of those two hundred times, did you ever see any signs there?

A Not that I can remember, no.

Q Did you ever see any fences or barricades around it?

A No, sir.

THE COURT: Bear in mind from 1961 to 1968 the Coast Guard has testified that they were using this tower. You never saw any case of any Coast Guard ownership of that tower?

THE WITNESS: No, sir.

THE COURT: 1968 you were what, twelve years old?

THE WITNESS: About that.

THE COURT: You were able to read then?

All right. Did you see any evidence of any Coast Guard activity or ownership in that period of 1961 to 1968?

THE WITNESS: It was painted all the time.

THE COURT: There was paint on it?

THE WITNESS: I guess they painted the metal.

THE COURT: Apart from maintenance?

THE WITNESS: No, sir, just state police around there, that's about it.

Q Now, during the times that you were there, did you see children there?

A Yes, sir.

Q Did you see children climb the ladder up to the top?

THE COURT: When are we talking about?

Q During the various times.

THE COURT: From 1961 down to 1972?

The next question was did you see children climb the ladders?

THE WITNESS: Yes, sir.

THE COURT: During this same period of time?

THE WITNESS: Yes, sir.

Q Now, coming back to June 24, 1972, did you go up the tower?

A Yes, I did.

Q After you went up the tower, were the others there, by that I mean Victor, Debbie?

A When I went up the tower later?

Q When you went up the tower the first time on June 24th. My questions now are directed to June 24, 1972, the date of the occurrence you testified you went up the

tower.

A Yes, sir.

Q Now, at the time you went up the tower, had the others also gone up the tower, referring to Victor, Debbie and Eileen?

A Yes, sir.

Q After you got up to the top of the tower, what did you do?

A I looked around. I guess that is what everybody does when they first get up there.

Q Did you do anything else specifically in regard to cigarettes?

A Yes, I asked Victor if he had any cigarettes.

Q You what?

A I asked Victor if he had any cigarettes.

Q Did he have a cigarette?

A No, I didn't.

THE COURT: The question is did Victor have any cigarettes.

A No, I didn't.

THE COURT: He didn't?

THE WITNESS: No.

MR. RUDOFSKY: Please speak up.

THE WITNESS: I am sorry.

Q What did you do after that?

A I went down to the beach to see if I could get a cigarette.

Q Did you get a cigarette?

A No.

Q What did you do after that?

A I went back up the tower.

Q When you went back up the tower did you see Debbie?

A Yes, sir.

Q Where was she?

A Standing by the rail.

Q Now, referring to the diagram on the blackboard under the name Victor Behrend, let me first ask you, are you familiar with the directions there?

A Yes, sir, I would say so.

Q Now, the hole is facing where?

A The south side.

Q Would that be the ocean side?

A Yes, sir.

Q And now, as we are facing the tower as we are looking at it from the ocean and beach, would be on the right side?

A Yes, it would.

Q Having those directions in mind, when you saw Debbie when you came up, where did you see her?

A She would be in the southeast corner.

Q Which way was she facing?

A When I saw her?

Q Yes.

A Southeast.

Q Pardon me?

A East, southeast.

Q What next did you observe about her?

A She turned around.

Q And did you observe anything else?

A She turned around and faced northwest.

No, she sort of faced west.

Q I didn't hear you.

A She faced west.

Q Did you observe what happened, what she did?

A She took a step and fell through the hole.

Q Do you know in what position she had her hands before she turned around?

A No, I didn't.

Q Did you observe anybody smoking up at the tower?

A No.

Q Can one see what is doing at the catwalk ten or twelve or fifteen feet from the tower?

MR. RUDOFSKY: I object.

THE COURT: Sustained.

MR. SCHWARTZ: Okay.

CROSS-EXAMINATION

BY MR. RUDOFSKY:

Q Mr. Peers, did you ever claim to be in love with Debbie Barth?

A To be in love with her?

Q Yes or no?

A Yes.

Q Do you want to see her recover?

A Do I want to see her recover?

Q Do you?

A I don't care anything about money.

Q You don't care?

A I care about her, the money has nothing to do with it.

Q But you care about her?

A Yes.

Q As I understand your testimony, you have been coming to this tower with some frequency some two hundred or more times?

A Yes, sir.

Q Since 1961?

A About then, I'd say.

Q And the tower is at Democrat Point?

A Yes.

Q Since that time, the Coast Guard had not been using that tower?

A I don't know if they were using it or not.

Q Were you there during the week?

A No.

Q Were you there on the weekend?

A Yes, sir.

Q Were you there during the day?

A Early morning.

Q How early?

A About six in the morning I would say, sometimes five, sometimes seven.

Q Now, I believe you testified that you had gone down to get or look for some cigarettes and you were returning to the top of the tower or had returned to the top of the tower when Miss Barth fell; is that correct?

A Yes, sir.

Q Were you still on the stairs leading up to the enclosed room when she fell?

A No.

Q Where were you exactly?

A In that little half-room, I guess I call it.

Q You were already there?

A Yes, sir.

Q You were standing up straight?

A Yes, sir.

Q Did you give a deposition in this case?

A Yes, sir.

Q Did you give a deposition last night?

A Yes, sir.

MR. RUDOFSKY: I'm sorry, your Honor, I have the wrong deposition here.

THE COURT: Tell me something: Where was Victor standing?

THE WITNESS: I don't know where he was standing when I came up the second time. When I left he was I guess I'd make that about where the X is, the north-east.

THE COURT: When you left?

THE WITNESS: Yes, sir.

THE COURT: You don't know where he was when you came back?

THE WITNESS: no.

THE COURT: Where was Eileen standing?

THE WITNESS: I don't remember.

THE COURT: Was she there?

THE WITNESS: Yes, she was there.

MR. RUDOFSKY: Give me a moment, your Honor.

Q During the course of that deposition, were you asked the following questions and did you give the following answers:

"Question: What was Miss Barth doing immediately before she fell?

"Answer: Looking at the water.

"Question: Was she standing still?

"Answer: Immediately before she fell?

"Question: Right.

"Answer: Well, she was standing looking at the water and I had come up from the beach and as I popped my head up through the hole there is this little half-room. Me and Debbie were sort of like in love at that time. She had turned around and started walking the other way and just as I popped up I saw her turn around and disappear. I looked down under the ladder and saw her hit the sand."

Were you asked those questions and did you give those answers?

A Yes, sir.

Q Was that the truthful answer to the question?

A Yes. Maybe there is some discrepancy. I meant erect so I could see what was going on.

Q So you say you were standing in the room?

A Yes, that is what I meant yesterday.

Q And the room has a solid floor?

A Except for the hole.

Q You were standing on the solid floor?

A Yes.

Q You looked down and saw her hit the ground through the floor?

A No, I looked back through the ladder because all there is is the girders and I saw her hit the sand.

MR. RUDOFSKY: I have no further questions.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q What hole did you look down on?

A The hole in the middle of the floor when you come up.

Q At the time you saw her you were standing in that little room?

A Right.

Q You were not first coming up the hole?

A When I saw her fall?

Q Yes.

A I was in the room.

Q When you saw her turning around were you standing in the little room?

A Yes.

MR. SCHWARTZ: That's all.

THE COURT: All right.

MR. SCHWARTZ: I offer Plaintiff's Exhibit 12 in evidence pertaining to an agreement between the Long Island State Park Commission and the United States.

MR. RUDOFSKY: No objection, your Honor.

THE CLERK: Document marked as Plaintiff's Exhibit 12 in evidence.

(So marked.)

MR. SCHWARTZ: I offer Plaintiff's Exhibit 14 in evidence.

MR. RUDOFSKY: No objection, your Honor.

THE CLERK: Plaintiff's Exhibit 14 received in evidence.

(So marked.)

THE COURT: May I see that, please?

MR. SCHWARTZ: I offer Plaintiff's Exhibit 13 in evidence.

MR. RUDOFSKY: No objection, your Honor.

THE CLERK: Plaintiff's Exhibit 13 received in evidence.

(So marked.)

MR. SCHWARTZ: I offer Plaintiff's Exhibit 6 in evidence.

MR. RUDOFSKY: No objection, your Honor.

THE CLERK: Report received in evidence as Plaintiff's Exhibit 6.

(So marked.)

THE COURT: Anything else, gentlemen?

MR. SCHWARTZ: Plaintiff rests, your Honor.

MR. RUDOFSKY: Your Honor, the defendant moves to dismiss for lack of a prima facie case and I'd lik an opportunity to address the Court.

Your Honor, as I indicated in my brief, you should note that it was note disputed in the brief filed after the defendant's brief. The New York State Court of Appeals in 1974 in the Martinez case made it clear that New York would look to Section 339 of the restatement of tort, second, in judging liability in a case of this nature. I would, at this point -- and I am not addressing contributory negligence in the classic defense of assumption of risk, at this point I am

addressing subsection 3 of Section 339 which would be found on page 3 of the defendant's brief.

That section reads that one of the conditions which must be fulfilled to establish this is that the children, because of their youth, did not discover the condition, i.e., the dangerous condition, or realize the risk involved in it or in coming in the area made dangerous by it and, your Honor, our argument is very simple: The Plaintiff was on the stand. She testified that at the time at the age of 14 years, had she thought of it, she would have realized in approaching the tower that it was dangerous to climb it. She specifically testified at least by way of admitting that her deposition was accurate, that when she climbed out on the catwalk she was afraid of falling but she climbed anyhow.

Two girl friends, the same education and same age, accompanied her. One girl friend climbed the tower and testified in court that she was scared. She climbed anyhow, but she acknowledges she was scared.

The other girl friend does not recall being scared but the fact remains that she had the good sense not to climb the tower. When four out of six teenagers do something and two remain behind you can make an inference from that.

MR. RUDOFSKY (Continued) I believe that the testimony of Miss Gallagher and Miss Barth herself established that if the children, i.e., the 14-year-old teenagers here did not discover the condition or realize the risk it was not because of their age and I suggest that a prima facie case, judging from 339 as the guideline as the law in New York, has not been made out, and this case ought to be dismissed.

THE COURT: What do you have to say on the subject, Mr. Schwartz?

MR. SCHWARTZ: I have submitted to the Court --

THE COURT: I read your memorandum of law. I want to know what you have to say on Subdivision (c) of Section 339. I have not read all of the cases. I have read the McGill case. The McGill case involved a 7-year-old child. The Government points out, as I understand it, these are 14-year-old children and the circumstances are different.

What do you say on Subdivision (c)?

MR. SCHWARTZ: If the Court will note in the Martinez case there was a 15-year-old boy involved. And the Court of Appeals in the State of New York now has gone away from this question of trespass.

THE COURT: We are not talking about trespassing.

I am talking about the ability to discover at the age of 14. That is what Subdivision (c) says. If we are talking about trespassing we would start on a completely different level. The Government is not, and neither am I, I will give you all of the business about trespassing for the sake of argument for the moment. I am asking you about the ability of these children to observe at the age of 14.

MR. SCHWARTZ: All right, from the factual pattern of the case, she did not know that there was any hole.

THE COURT: You have photographs here that make one wonder.

MR. SCHWARTZ: Do I assume the Court --

THE COURT: Did you look at those photographs?

MR. SCHWARTZ: Pardon me?

THE COURT: Did you look at those photographs you offered in evidence yesterday?

MR. SCHWARTZ: Is the Court referring to the hole from the ground?

THE COURT: If one looks at the tower at all wouldn't one see the hole?

MR. SCHWARTZ: It would depend on the position of the individuals from the ground.

THE COURT: Would it? You have four or five photographs and the hole shows in each one, and that is why the Government addresses itself in this question to the ability to observe.

MR. SCHWARTZ: That is what I am trying to do.

On the question of the hole from the ground, first of all there is no testimony anywhere regarding whether the children saw the hole or the plaintiff saw the hole. When they went to this particular tower their minds were getting into the tower to observe the view. No survey was conducted about them looking up at the tower, nobody testified that they looked up and observed the hole or that they looked up.

THE COURT: The plaintiff testified that she deliberately did not look but that is not the point. The subdivision (c) says the child, because of their youth, does not discover the condition. It is because of their youth. Are you trying to tell me that a 14-year-old child is incapable of observing a hole?

MR. SCHWARTZ: No. I don't say that. I say we have to take the factual pattern as it is, and that if a child of 14 goes to a tower for the purpose of climbing a tower and gets on a tower and is climbing the tower it does not necessarily have to examine the top of the tower before the individual starts to climb.

When children go to a place specifically in a group and their mind is set on climbing a tower and they are engaging in conversation among themselves, whatever they are doing at the time, their mind is taken up with one another and when they go to the tower and one climbs the tower and the other one follows and climbs the tower, they do it automatically and that is the natur· of children, especially if they are in a group.

THE COURT: Under that rationale that is the nature of an adult, whether he be 14 or 80, but I don't think that is a rationale. The question is whether because of this girl's youth she was unable or did not discover the condition. That is the question, not whether she was talking to somebody else or carrying on small talk and patter. You or I could do that and not observe, but that is not because of our age.

The question is, because of her age, I want you to address yourself to that question, because of her youth, in your opinion is she incapable of discovering this, because of her youth?

MR. SCHWARTZ: I don't think that is the question at issue.

THE COURT: You will address that. The New York is as stated in 339. You yourself agree to that.

The McGill case is the general law.

MR. SCHWARTZ: I didn't say that. In my brief, I cited the New York cases.

THE COURT: Is there any question but that this is the New York law?

MR. SCHWARTZ: That section?

THE COURT: 339.

MR. SCHWARTZ: I haven't seen it cited in any New York case.

THE COURT: It's cited in the very case you rely on; the Martinez case.

MR. SCHWARTZ: I thought I had a photostat of the Martinez case. I quote the Martinez case in its opinion and from what I have here I don't see any reference to it. It is my recollection --

THE COURT: In other words, you are saying that 339 is not the law of New York?

MR. SCHWARTZ: It is not my recollection that that is referred to in the Martinez case. It may be. I don't recall it as such.

THE COURT: You refer to the Martinez case in another connection. The Government says that is the basis of the decision.

MR. SCHWARTZ: I don't say that. That is basic New York law. The New York law is what I have cited in

my cases. That is just the general statement that may apply in certain situations, not that it is New York law --

THE COURT: It is in the McGill case, which you cite and rely on. I grant you that does involve New Jersey law.

MR. SCHWARTZ: I cite the McGill case to indicate the change that is taking place in the law throughout the country.

THE COURT: McGill says this is the proper law.

MR. SCHWARTZ: And also that taking down of the tower would be some indication of the danger involved.

THE COURT: That is after the fact. You know that as well as I do. That is not evidence.

MR. SCHWARTZ: At least the McGill case had referred to it as such and that is why I put it in. because they took the tower down.

But I don't think that the fact that one may observe from the ground a hole is the gravamen of the action, and further, there is no testimony that the Plaintiff saw such hole and furthermore, the New York cases indicate and definitely state that where the danger is so great -- and in this case it amounts to the nature of a trap -- to the one who does not know it -- that it would be such that that would even

excuse negligence, if there was such.

Now, the question of the youth, age --

THE COURT: Your proof comes to where your last witness testified that for nine years -- over a period of more, eleven years -- some two hundred occasions, he not only went up that tower but he saw any number of children with this so-called trap or dangerous condition existing and there never was an untoward incident. So you have something here. That is why I get back to Subdivision (c), the child, because of his youth, does not discover --

MR. SCHWARTZ: Subdivision (c) only deals with some isolated situations that do not pertain here. For instance, suppose this was a grown-up, so we get away from the question of youth, for a moment. Suppose it was a grown-up and he did not know that this hole existed before he climbed up and he climbed up and he wasn't aware of the hole, the way it was situated at the catwalk, and he made a turn to follow -- and I am not saying this is the reason -- and to follow at least the pattern the Court had indicated, that anything up there and now showing any negligence up there, that is up at the catwalk, for the purpose of discussion, turns and falls and gets killed or seriously injured. Then I take it, under the Court's suggestion,

that no one going up there would have a case in spite of the inherent danger.

THE COURT: What I am asking you is, is there inherent danger when something is open and notorious and where the courts have said also it is a child, because of his or her youth, is not able to discover the condition.

MR. SCHWARTZ: I am even getting away from the youth part.

THE COURT: You are saying that if she was an adult of say 25 or 30 and the same thing happened, there would be liability here, anyway. Is that what you are saying?

MR. SCHWARTZ: Correct.

THE COURT: On the ground of negligence, not on the ground of attractive nuisance. What you are saying to me is, forget about the question of attractive nuisance. You have established a negligence case.

MR. SCHWARTZ: In order to cover that specific point that the Court raised, I think one of the courts expresses it.

THE COURT: I follow what you are saying and you are saying that this condition existed for a period of time and the Coast Guard had notice. It was a

dangerous condition and they should have done something about it.

All right.

MR. RUDOFSKY: Your Honor, may I be heard?

THE COURT: Yes. I am going to reserve decision but I will listen to whatever response you have.

MR. SCHWARTZ: Here are words I would like to mention to the Court in the case of Wattell, 29 New York 2d 372, page 380.

THE COURT: Is this in your brief?

MR. SCHWARTZ: Yes.

THE COURT: I have it.

MR. SCHWARTZ: The last paragraph. In some cases the situation created may be so dangerous and the negligence of the party so extreme as to exclude any other proximate cause, thus vitiating the act of the other party which might under ordinary circumstances be contributory negligence.

THE COURT: I understand your theory.

MR. SCHWARTZ: The youth situation brought in under all the surrounding circumstances --

THE COURT: What are you saying to me? Her youth? She might not have as high a standard of conduct for contributory negligence purposes for reason of her youth.

What you are not trying to say to me is that this is strictly an attractive nuisance type of case.

MR. SCHWARTZ: It is a combination.

THE COURT: You are really saying this is negligence and she couldn't be held to as high a degree because of her youth.

MR. SCHWARTZ: I am not exclusively relying on subdivision (c).

THE COURT: You are not able to get around Subdivision (c).

MR. SCHWARTZ: I think under the New York cases I do. As I say, I don't have the photostat of the case itself, because I knew I photostated it, but I did keep the opinion which I have in the brief and I don't see a reference to it there but I am not prepared to say anything. I am not sure about this question of age. When your Honor said something about seven, there is another case that refers to an age of fifteen, New York case Mantis v. Coswell, 283 Appellate Division, I think the page is a little out of order but the other citation 130 New York Supp. 2d 602, the Court held that the infant plaintiff who was 15 years old --

THE COURT: That is not for contributory negligence purposes.

MR. SCHWARTZ: Yes.

THE COURT: I don't have any problem with that.

MR. SCHWARTZ: I only mention that because of what a particular person -- that age may mean whatever the age would be, would be applicable to that particular individual.

There are other cases which I have cited on the last page in my brief and which I mention the fact further in Tabor v. O'Grady, 157 2d 701, where the Court held the rule of this and other jurisdictions that contributory negligence is not available as a defense when the defendant had been guilty not merely of negligence but of wanton or willful misconduct. Certainly there is wanton negligence in a situation of this type taken in the context of being in an open beach and the area where people are bathing, and so forth, and having an open whatever-you-call-it trap at the catwalk.

THE COURT: Better make it open hole.

MR. SCHWARTZ: For years with so many people and children going up there is wanton negligence, gross negligence.

THE COURT: I wonder about that.

If Miss Barth was the fifteenth child to fall through that hole in the period of two or three years you might have a pretty convincing proof of gross

negligence but she was the first.

MR. SCHWARTZ: But this theory of the law applies regardless of the age.

THE COURT: I think it gets to be wanton and gross negligence when they are on notice that they have a dangerous problem and they do not do anything about it. You don't have that kind of proof yet.

MR. SCHWARTZ: But I don't want the Court to think if I use an expression, do not misunderstand my language, where I think a fair, ordinary viewpoint as one takes this whole thing into consideration, I think it just strikes one it is outrageous, this thing being set up over there, and so on and so forth. It is terrible, forgetting about the law for a moment, if it hits one like that, would not that be gross negligence, wanton negligence, in the sense that the law applies?

THE COURT: I don't know, Mr. Schwartz. We are not always dealing with a judge's mind.

Everything that results in a misfortune isn't necessarily negligence and where something is open and obvious to all I think you find the cases raising questions about the negligence and the real question here is whether this is open and obvious to all, including a fourteen-year old, twelve-year-old or sixteen-year-old or whatever happens to be the case.

This is the problem. This is not an open-and-shut matter, as I think you are inclined to view it. That is your job to view it that way, but it is not so open-and-shut as you think it is.

In any event, I will reserve decision.

MR. RUDOFSKY: May I be heard?

First of all, I must say that Mr. Schwartz has done some not inconsiderable testifying on his client's behalf during the course of his argument. There is no testimony that any tower is on the beach. The testimony is the children were on the beach and they walked over a mile to get to the tower.

THE COURT: I know the beach they walked down. They walked a mile on the beach, this is all beach.

MR. RUDOFSKY: I would be more than happy, as part of the Plaintiff's case, the Plaintiff who testified that she walked over the sand dunes, they left the beach and followed some narrow trail. It is not standing near the concession stand.

THE COURT: It is down on the westerly end of Robert Moses State Park and the tower, to my recollection, is way down toward the inlet and that was one of the first questions I asked her and she said yes, it was down toward the inlet.

MR. RUDOFSKY: At the westernmost point.

THE COURT: It is a mile and a half to two miles

MR. RUDOFSKY: They walked down there.

THE COURT: This is not an uncommon thing. Almost everyone walks down to the Point.

MR. RUDOFSKY: I am merely suggesting that you characterize as being on the main, bathing part of the beach, as it was characterized.

THE COURT: I am fully aware of the fact, based on my own knowledge. I asked her these questions to confirm the facts. I didn't take that as a fact this tower is not sitting in front of the beach where the life guard sits.

MR. RUDOFSKY: I don't want to belabor it but I do want to contrast the facts of the case with McGill. In McGill, the tower was much, much closer to the boardwalk and the plaintiff was much, much younger.

THE COURT: I am fully aware of where the tower was located.

MR. RUDOFSKY: And in Martinez, where you again had a collapsing structure, when the child is no longer required to discover, the child is not held to the level of being able to tell when the tower is going to collapse or when the fire escape, as in Martinez, was going to collapse. Nothing collapsed here.

As your Honor has stated, this was an open and

obvious hole. To answer the question of whether the Court of Appeals cited Sect.on 339, just for the record I have before me Vol. 34 of the New York Report, page 821, where the Court says, and I pick up in the middle of a paragraph at the beginning of the sentence:

"Under the facts of this case, the duty of care owed plaintiff could be correlated to the risk of harm reasonably perceived regardless of the status whether that of trespasser, licensee or invitee in the traditional sense."

Without reading any further, I would note that Section 339 is further cited in the same paragraph. That, I believe, is the most recent case that seems to be a point in this area. For years if states have been turning to Section 339 I believe in the Martinez case, New York, it turned to 339.

THE COURT: I do not think he seriously disputes 339. His point is that this was negligence, a case of negligence. He says the Coast Guard, according to the testimony of his last witness, and must be assumed to be correct, this condition was in existence for eleven years prior to this accident, and the Coast Guard did nothing to correct the situation for eleven years. He says given that they

had constructive notice, if not actual notice, of this condition and under those conditions you have negligence. If in fact he says it was wanton and gross, I am not quite sure he is right.

MR. RUDOFSKY: Your Honor seems to suggest during Mr. Schwartz' argument that 339 was related to attractive nuisance and that there was a difference, at least for the purposes of this case, between ordinary nuisance and attractive nuisance. I would suggest that 339 is not solely an attempt to answer the problem of attractive nuisance. I believe it is an attempt to set forth guidelines for judging liability as the section says.

THE COURT: Didn't 339 grow out of the so-called attractive nuisance? That is what I understand McGill to say.

MR. RUDOFSKY: It takes care of attractive nuisance claims, as well as giving the courts a guideline for judging negligence.

Certainly, in Martinez a fire escape is not an attractive nuisance.

THE COURT: He is saying you do not have subdivision (c) for your benefit if we assume that Miss Barth was 21.

MR. RUDOFSKY: I believe he is wrong, your

Honor.

THE COURT: He is saying forget about her age, the Coast Guard had a notice of this condition for eleven years and they did nothing about it, and forget -- or assume she is 40 or 50, forget all of that. Supposing it was a 40-year-old person?

MR. RUDOFSKY: The question that is before your Honor, would a 40-year-old person reasonably discover --

THE COURT: You are talking about contributory negligence and assumption. He says forget that doctrine of contributory negligence and assumption of risk and then give me the benefit of her age.

MR. RUDOFSKY: Except 339 was designed to give benefit of age to give children help, not to hinder recovery, and if she does not meet it under this basis, how is she going to meet it under a higher doctrine?

THE COURT: I understand what your argument is but I think he is correct in his assertion. You get right back to the question as far as contributory negligence and assumption of risk is concerned, what duty is there on a 14-year-old child, and that is what I have to look at.

MR. RUDOFSKY: I understand that and I suggest

that --

THE COURT: What else do we have?

MR. RUDOFSKY: I have one witness who I indicated in the brief is a civil engineer for the Coast Guard, and I have another witness who is one of the persons at the tower, Mr. Castelli. He is not a doctor but he is some sort of a medical person at Pilgrim State, and I so advised your chambers. He can be at court at 4:00 o'clock this afternoon. On advice of your Law Clerk I would propose to put Mr. Castelli on at 4:00 o'clock.

THE COURT: Let's do that.

MR. RUDOFSKY: Very good, your Honor.

A L A N Z A M M I T , called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as follows:

(continued next page)

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q What is your address, please?

A 415 Howe Avenue, Bronx, New York.

Q By whom are you employed?

A United States Coast Guard in a civilian status.

THE COURT: Bronx?

THE WITNESS: Correct, sir.

Q In what position are you employed?

A I am Supervisor, General Engineers, in the Structural Section of the United States Coast Guard, Engineering Division.

Q How long have you been in this section?

A I'd like to clarify that. The structural section previously was known as the civil engineering section and I have been in the combined section for ten years.

Q What is the relationship between the structural section and the tower that this case is involved with?

A This tower comes under the cognizance of the structural section.

Q How long have you been the supervisor of the section?

A Approximately six years.

Q So then you were the supervisor of the section

both immediately before and immediately after June 24, 1972?

A Yes, sir.

Q What is your educational background?

A I graduated from the City College of New York in 1959. I have a license from the State of New York and from the State of Massachusetts to practice professional engineering.

Q And what did you study at City College?

A Engineering. I obtained a civil engineering degree from the City College of New York in 1959.

Q In the course of your duties as a supervising engineer for the Coast Guard, you have access to documents, records of the Coast Guard pertaining to the tower that we are discussing?

A I do.

Q My question of you previously concerned those records and documents pertaining to this tower. You have access to those?

Q Have you reviewed those documents?

A I have.

Q Are you familiar with them?

A I am familiar with them.

Q And with the contents thereof?

A Yes.

Q Will you tell the Court based on that

familiarity when this tower was erected at Democrat Point.

A The tower was erected at Democrat Point in 1965; completion of the construction was June 2, 1965.

Q Were you in court this morning when Mr. Peers testified?

A Yes.

Q Are you aware that he visited this tower in 1961 and 1962 and thereafter at Democrat Point?

A I heard the statement of that fact.

Q Where was this tower located before it was located at Democrat Point?

A To the best of my knowledge it was at Fire Island Station at the present location on the east side of the Robert Moses Causeway Bridge.

Q Was there any Coast Guard tower at Democrat Point prior to 1965?

A I personally am not aware of one.

Q Do the records reveal any?

A The records I saw did not indicate another tower at Democrat Point.

Q Based upon your review and familiarity with the records, are you aware of whether this tower was operated by the Coast Guard at Democrat Point for this period of time?

A The records that I saw showed that no watch was made after 1966.

THE COURT: You introduced these records in evidence yourself, counselor.

MR. SCHWARTZ: Yes.

Q Is it your understanding, based upon these records, that watches were stood prior to 1961?

MR. SCHWARTZ: I object to counselor's reference. The record is not in evidence.

THE COURT: Have you looked at your own Exhibit 14 that you offered a little earlier?

MR. SCHWARTZ: I don't have a copy.

THE COURT: Did you look at it before you offered it?

MR. SCHWARTZ: Yes, I looked at it.

THE COURT: And you still object? Do you want to look at it again?

MR. SCHWARTZ: May I look at it, Judge? Some of the things are not legible.

THE COURT: I thought it was pretty clear from the opening of the tower to 1966 they did stand watches. I think the testimony is also in the examination before trial of Lt. Daniels.

I'll allow it.

Are you aware of whether they were standing watch from 1965 to 1966?

THE WITNESS: No, sir, just what was in the record that watches were discontinued after 1966.

Q Now, did your review of the records relevant to this tower indicate that there had been any prior accidents reported?

MR. SCHWARTZ: I object to that question.

THE COURT: I would sustain it without a specific identification of what records you are talking about.

Q What records did you review at my request relative to this tower?

A I reviewed drawings, I reviewed proceedings of the Board of Survey.

THE COURT: Would those proceedings contain the records of any accidents that had occurred?

THE WITNESS: It did not, sir.

THE COURT: I say would it?

THE WITNESS: No, sir.

THE COURT: If any other accidents had occurred, would the proceedings of the Board of Survey contain the record?

THE WITNESS: No, sir.

THE COURT: Go ahead.

Q Did you review any other records?

A I reviewed property records in the legal office; I reviewed any available records I could find in the comptroller's office and in the civil engineering office of the Third Coast Guard District.

Q Did any of those records refer to any prior accidents on this tower?

A No, sir.

Q Did any of those records refer to any complaints from members of the public?

MR. SCHWARTZ: I object to that question.

THE COURT: I will allow it.

A No, sir.

MR. RUDOFSKY: Your Honor, may counsel approach the bench at this time?

(Side bar discussion.)

THE COURT: Let us mark these. Mark them all because the originals were marked Exhibit 9. Mark all these Exhibit 9.

MR. RUDOFSKY: These are 9 and 11.

THE COURT: All right, take 9 first. Bring up the engineer's drawing of the tower as 9.

What are you offering, 9 or 11?

Put a mark on 11.

MR. SCHWARTZ: Could I spend a minute looking at it?

THE COURT: Yes. Mark it Exhibit 11.

THE CLERK: Document received in evidence as Government Exhibit 11.

(So marked.)

BY MR. RUDOFSKY:

Q Mr. Zammit, I have handed you Plaintiff's Exhibit 11 offered by the Government, and I would like you to direct your attention --

THE COURT: What is that? Is that a blueprint of the tower?

THE WITNESS: It is a blueprint of the construction.

Q I would like you to direct your attention to the left-hand side of Exhibit 11, and I would like you to explain to the Court what exactly is shown there?

A It's an elevation view of the lookout tower at Fire Island. It shows a structure of approximately fifty feet high which I scaled previously. The scale is 1/8 of an inch to one foot.

It also identifies the structure as being a relocated fiftp-foot steel tower and a top that is a new

watch house and the watch house was one that was constructed in accordance with a drawing whose number is 03-1644. It also shows that the tower sits upon a new concrete foundation which was made in accordance with another drawing. That drawing being 03-1327.

It also shows coming from that foundation a stair, constructed of wood frame, the size of whose members are normal timber sizes such as two by four and two by six, and also three by four posts.

THE COURT: That being the little steps in the lower right-hand corner of the side of the tower?

Q Is that an "as built" drawing or merely a plan?

A It is not an "as built" drawing. It is an elevation view rather than a plan view.

Q Would you explain to the Court what an elevation view is?

A An elevation is a section taken on a vertical. A plane is on the horizontal scale.

Q At my request, have you reviewed the records that you previously enumerated for the Court to determine whether the steps that you have referred to were ever actually appended to the tower?

A Yes.

Q What do the records reveal?

A The records show that the stairs were constructed. I believe that may have been 1963 under the erection and construction of the lookout tower.

Q Mr. Zammit, I am handing you Plaintiff's Exhibit 2 in evidence which has been previously identified for the Court. Would you tell us whether the stairs that you have just referred to are evident in that photograph?

A They are not.

Q And if the stairs were appended to the tower in confirmation of the work order which you found in the records, would they be evident in the photograph?

A They would have been.

MR. RUDOFSKY: May we have the document marked Government's Exhibit 9 in evidence, the blueprint?

THE COURT: That is in evidence.

THE CLERK: It is in evidence.

Q Mr. Zammit, I am handing you Plaintiff's Exhibit 9 offered by the defendant. Would you explain to the Court what that exhibit is?

A This exhibit shows a bigger blow-up of the tower previously discussed, and it is to scale. It also shows a planned view of the cabin floor also being known as the watch house. It shows marked up the location of the hall

in the catwalk, the location of the stairs going into the floor of the watch house. It also shows some details about gratings and also shows the location of the stairs that emanate from the concrete foundation to the top of the watch house. Excuse me, to the underside of the watch house.

It also shows the emergency ladder that goes from the hole in the catwalk to the first landing beneath the watch house floor.

THE COURT: Here (indicating)?

THE WITNESS: Yes, sir, that ladder is identified in red and is approximately, I believe, it was twelve feet high.

THE COURT: One man walks across the girder and --

THE WITNESS: There is a plate in there.

THE COURT: So you go across the plate to the ladder and then down?

Q I am handing you Plaintiff's Exhibits 1, 3 and 4 in evidence, and I would like you to show the Court where that emergency ladder you have just referred to is, if it is on the photograph.

A Yes, sir, this is it.

MR. SCHWARTZ: May I see what he is pointing to?

THE COURT: Certainly.

THE WITNESS: This is the emergency ladder. It goes from the hole down to this open steel grating.

This is the same ladder. This is the ladder again.

Q Thank you.

Mr. Zammit --

THE COURT: Let me ask you this: To your knowledge are these the photographs taken and identified by Lt. Daniels in his deposition?

MR. RUDOFSKY: These are not, your Honor. Plaintiff did not want to use them but he can provide the Court with those photographs, if he wants.

THE COURT: When was that taken?

You offered these, didn't you?

MR. SCHWARTZ: Yes, sir.

THE COURT: Are the photographs taken by Daniels available?

MR. RUDOFSKY: Yes, sir, they are.

I believe they are down in my office.

THE COURT: Would they show similar views?

MR. RUDOFSKY: All the pictures are identical.

THE COURT: Can you get them up here now?

All right. This afternoon, about 4:00 o'clock.

Q Now, Mr. Zammit, did your review of the

blueprint and other records that you described to the Court indicate whether when the tower was constructed in 1965 there was a hatch cover for the hatch?

A Could I have that question again, please?

THE COURT: The near hatch or the outer hatch?

Q The hatch on the catwalk, did the plans indicate a hatch?

A Yes, they do.

THE COURT They indicate a hatch cover?

THE WITNESS: Yes, sir.

Q Have you, at my request, and based upon your engineering background and records available to you, attempted to or actually worked out how heavy the hatch cover was?

A Yes, sir. The weight of that cover was approximately 35 lbs.

Q Do the plans reveal that the hatch cover was hinged or was left in the hatch analogous to a manhole cover?

A The drawings are not specific to say that the hatch at Fire Island was hinged.

THE COURT: They are not specific?

THE WITNESS: No, sir, the drawing that we have available.

Q Is the plan for this tower a standard plan?

A It is a standard plan, standard drawing.

Q Are there other towers built in accordance with these specifications?

A Yes, sir.

Q Would you advise the Court as to some of them?

A Atlantic Beach, Breezy Point, Indian River Inlet, Thompson Inlet in New Jersey.

Q Do those towers have a similar hatch and hatch cover?

A They did.

Q Do you know if the hatch cover on those towers was hinged?

A I know for a fact that the one at Indian River which is in Delaware did have a hinged hatch.

Q Based upon your professional engineering background and experience in the Coast Guard, do you have an opinion as to whether this hatch cover would have been hinged?

A My opinion is that it was hinged because of the configuration of the construction of the plate which is a complete circle. If somebody lifted it, it would be possible for that hatch cover to fall within its own circle.

THE COURT: Fall down?

THE WITNESS: Yes, sir. Alsoduring storms of hurricane force, if any, there would be a tendency for vibrations to set up and the plate to start moving and

override its housing and slide off the catwalk. So in the interest of safety I feel that this cover would have been hinged. The drawing does show a hatch cover with hinges for a different-type shape than the actual cover was in this case.

Q In which case was it square?

A On the original construction drawing of this standard erection.

Q Now, from the files that you have reviewed did they indicate that the Coast Guard removed the hatch cover at any time?

A No, sir.

Q Do they indicate that the Coast Guard had any private company remove it at any time?

A No, sir.

Q Do the files reveal that the Coast Guard was aware of the fact that the hatch cover had been removed?

A No, sir.

MR. SCHWARTZ: May I object to that and move the answer be stricken?

THE COURT: Well, it's a negative. It does not mean that there were not. I will take it for whatever it is worth. The files he examined did not show anything.

Q I would note, your Honor, under federal rules, the lack of a record is significant.

THE COURT: It may be that somebody ran down and told the commandant there was no hatch cover there. It might not have been in the files reviewed.

MR. RUDOFSKY: That's true, your Honor.

Q Were you in court this morning when Mr. Peers testified?

A I was.

Q Did you hear me read Mr. Peers a portion of his deposition testimony which indicated that just at the point when he was coming into the enclosed room he saw Miss Barth falling into the hole?

A I did.

Q With reference to that testimony and with reference to Exhibit 9, would you explain to the Court which way a person would be facing as they walked up the last rung of ladders and into the enclosure?

A They would be facing 180 degrees from the location of the hole in the catwalk.

THE COURT: Would they be facing north?

THE WITNESS: Sir, I have no record.

THE COURT: The opposite side of where the hole was located.

THE WITNESS: I would say so, sir.

Q I would like to direct your attention to the blackboard. We have had several versions of the event depicted on the blackboard. Directing your attention specifically to Victor Behrend's version of the events, would you, with this piece of chalk that I am handing you and by virtue of reference to Exhibit 9, would you indicate on the blackboard superimposed upon the diagram as Mr. Behrend helped us to draw it, would you indicate where the ladder would open into the enclosure?

A Yes, sir.

I marked it in yellow.

THE COURT: Right on top of the letter A.

THE WITNESS: It was going in this direction.

Q And where would the hatch be?

A The location of the hatch was 180 degrees out of phase from the ladder going into the watch house.

I placed an arrowhead on this line to indicate the ladder ascending through the watch house in that direction. I have no knowledge of north, east, south and west.

THE COURT: I understand.

Q Now, with reference to the drawing that appears under Miss Gallagher's name and assuming that the house was on the side where she indicated it was, the ocean side, would you again show where the floor would open and allow ingress from

the stairs?

A (Witness complies.)

Q Now with Miss Barth's diagram, would you show it on there, please?

A (Witness complies.)

MR. RUDOFSKY: Thank you.

THE COURT: How far -- turn the thing around.

Mr. Zammit, looking at the side that is labeled east on that drawing of Mr. Behrend's, how far from the southerly corner of the inner square toward the west was the edge of the hatch?

THE WITNESS: This hatch?

THE COURT: Or the hole.

THE WITNESS: If your Honor will permit, sir, the drawing is to scale and the position of the hatch is accurate. It is approximately in this location. I would like to scale the distance from the hatch to the immediate edge of the opening.

THE COURT: Would you, please?

THE WITNESS: The scale of the plan is 1/2 inch equals one foot; with the architect's scale it shows the distance to be approximately one foot, zero inches.

MR. RUDOFSKY: Your Honor, unless I

misunderstand your question, I think the record ought to reveal that the one foot measure is from the inner wall.

THE COURT: That is just what my question was. I think he answered it just the way I asked it.

Q Would you scale off and advise the Court how far the edge of the hole was from the railing of the catwalk, the southern railing of the catwalk?

A As identified on the blackboard.

It is approximately eight inches.

THE COURT: How wide was that hole?

THE WITNESS: A diameter of approximately twenty-four inches. However, the hole was not a complete circle. It was of this configuration with a flat cording across the circle as it approached the cab.

(continued next page)

Q Would you scale off how far the hole is from the eastern edge of the railing?

A Approximately four feet, zero inches.

THE COURT: You may sit down, sir.

Q Mr. Zammit, do the blueprints that you hae reviewed indicate how tall, how high the inner wall of the cab was?

A Yes, four feet zero inches, plus or minus one inch.

MR. RUDOFSKY: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q You were referring to certain records that you had examined. Are those records in court?

A Yes, sir.

Q May I see them?

(Counsel complies.)

MR. RUDOFSKY: Your Honor, for the sake of clarity of the record, I think we should indicate that those are the records that Mr. Zammit talked about this morning. I understand there are other records that he has not brought to court with him. The negative proof reports.

MR. SCHWARTZ: I intend to get to all of this.

I would like to have an opportunity to look at these, Judge.

MR. RUDOFSKY: They were produced to the Plaintiff during the course of discovery.

Although Mr. Schwartz did not personally conduct the discovery.

MR. SCHWARTZ: Do I understand counsel objects to my reading them?

THE COURT: You must proceed. If you have not prepared for trial properly it is your problem.

MR. SCHWARTZ: I would not have memorized them even if I had read them.

THE COURT: That's too bad.

MR. SCHWARTZ: Let's mark them for identification.

One is a final complete report for project dated June 23, 1965.

THE COURT: It is 17.

THE CLERK: Plaintiff's Exhibit 17 marked for identification.

(So marked.)

THE COURT: What is the other one, Mr. Schwartz, what is the other one labeled?

MR. SCHWARTZ: Report of construction and repair,

daily log.

THE COURT: Mark that 18.

THE CLERK: So marked as Plaintiff's Exhibit 18 for identification.

(So marked.)

THE COURT: Why don't you go on with something else and maybe we can recess for lunch and you can look at it during the lunch hour.

BY MR. SCHWARTZ:

Q I believe you stated you looked at something regarding reports of complaints.

MR. RUDOFSKY: I object, your Honor.

A I didn't.

THE COURT: He can handle himself.

A I know of no complaints that were issued.

Q I know you don't know of any, but you do say you looked at something to look for complaints.

A No, sir, I didn't say that.

Q Is there any particular records where complaints are kept?

A Not to my knowledge, sir.

Q Did you look at any specific papers for complaints?

A Sir, I looked in all logical places.

Q Wait a minute --

MR. RUDOFSKY: Excuse me, your Honor, I think the witness should be allowed to answer the questions. May I be heard?

THE COURT: Let him answer the question. Do not interrupt him. You can move to strike the answer.

MR. SCHWARTZ: I don't understand the witness talking. I don't hear.

A I looked in all the logical places where files on the Fire Island Democrat Point tower would be located. That would be the comptroller's office, the district legal office and the engineering office of the Third Coast Guard District.

Q Did you look at any specific papers there?

A All the papers available.

Q What do you call those papers?

A Drawings, construction plans and specifications. There were reports and a report of survey.

Q Let's stop right there.

MR. RUDOFSKY: I object, your Honor. First, he asked for the entire list and then he stopped. Let the witness say if there was anything else.

THE COURT: Finish the answer.

A Photographs, I believe I also saw, and an

instrument that gave the Government the right to erect the tower on state property at Democrat Point.

Q Which one, if any, would you expect to contain any complaint?

A The legal file.

Q I didn't ask you about legal files.

A In the district legal office.

THE COURT: He said that was one of the files he examined. Don't argue. Ask him questions.

Q When did you look at them?

A At the request of --

Q When?

A Approximately one year ago.

Q Who told you to look at them?

A I was directed by the district legal office of the Third Coast Guard District at the request of counsel (indicating).

Q Do you know whether he asked anybody else?

A No, sir.

Q What are your duties?

A My duties?

I am a civil engineer with the Third Coast Guard District. I am a supervisor of architects, civil engineers, and structural engineers.

Q What specifically do you do?

A I review drawings prepared by engineers under my direction.

Q Does that take up all your time?

A No, sir. In addition, I inspect the construction progress of contracts that are currently under progress. I also inspect the condition of some of the Coast Guard stations as time permits. I rate the people who work for me. I approve their leave. I have numerous duties as part of my employ with the United States Coast Guard.

Q Any of it include legal work?

A Yes, sir.

Q What legal work?

A Review and sometimes the preparation of metes and bounds descriptions and the drafting of such.

Q And what?

A The drafting of such. If there is nobody available to do it. If it is a rush job.

Q That is what you refer to as legal?

A Metes and bounds descriptions.

Q Do you do any other type of legal work?

THE COURT: Off the record.

(Discussion off the record.)

Q When did you go to work for the Government?

A 1959, in February, the United States Government, rather than the state government.

Q Did you ever visit this tower?

A No, sir.

THE COURT: Let me ask you a question: Did the plans for this tower call for a hatch cover over the hatch containing a hatch in the center?

THE WITNESS: Yes, sir.

THE COURT: It does call for a hatch not only on the one from the catwalk?

THE WITNESS: Yes, sir, hinged.

Q Do you have any knowledge of the proceedings before the Board of Survey?

MR. RUDOFSKY: Objection, your Honor. What Board of Survey? The Coast Guard conducts hundreds of them and Mr. Zammit has been at many.

MR. SCHWARTZ: Counsel is going to make a speech.

THE COURT: You are talking about the Board of Survey of this particular action?

THE WITNESS: The Board of Survey I was referring to was actually the tower structure. It was not the Board of Survey of the alleged accident.

Q Do you have any knowledge regarding the survey

supposedly conducted of this accident?

A I have heard what --

Q I did not ask you that. Do you have knowledge personally?

A No, sir.

MR. SCHWARTZ: Is it too early to adjourn for lunch?

THE COURT: How much longer are you going to be with this witness?

MR. SCHWARTZ: If I go through this I could be short or long.

THE COURT: This is the end of your cross-examination? Whatever is in this?

MR. SCHWARTZ: I believe so. Whatever hits me. I was wondering --

THE COURT: We can come back at five minutes to two.

MR. SCHWARTZ: There is no jury so we can come back a little earlier.

THE COURT: We will adjourn to five minutes to two.

(Luncheon recess.)

AFTERNOON SESSION 190
(2:05 p.m.)

ALAN ZAMMIT, called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION

BY MR. SCHWARTZ: (continuing)

THE COURT: Do you wish to proceed, Mr. Schwartz, with further cross-examination?

Q I believe you stated there was another tower?

A No, sir.

Q This was the only tower there in the area?

A This is a tower on the end of the jetty as an aid to navigation.

Q How far?

A I would have to scale that off on the drawing. My guess is a quarter of a mile.

THE COURT: At the inlet? It is not a real tower, it is like a lighthouse without a shell?

THE WITNESS: It is a straight tower with the height of about twenty feet.

THE COURT: With the light on it?

THE WITNESS: With the navigational light.

Q When was that constructed?

A I have no idea, sir.

THE COURT: It is like a red light.

THE WITNESS: It would have a standard aid to navigation, 155 millimeter lantern.

Q When was this tower taken down?

A Which tower?

Q The one under discussion at the time of the occurrence.

MR. RUDOFSKY: Your Honor, I object to this question about the tower being taken down unless Mr. Schwartz is questioning the witness about when it was taken down prior to the accident and moved.

THE COURT: You already let it in.

MR. RUDOFSKY: In effect, this tower was taken down twice.

THE COURT: You already let the evidence in. It is in one of these exhibits in the fall of 1972.

MR. RUDOFSKY: May he specify which time he is talking about?

THE COURT: It is in evidence. I will allow it for the purpose of credibility.

MR. RUDOFSKY: How is the witness to know which time he is talking about? The tower was taken down once and moved and taken down and put up again.

THE WITNESS: This tower was last taken down in

September of 1972 and that information was gathered by me in reviewing the files.

Q It had been taken down once before?

A This tower was under the contract document that you have a copy of. It was located from the Fire Island station to Democrat Point, approximately two and a half miles away, west.

Q Now, does the diagram you have reference to show the hole?

A This drawing, sir?

Q Yes.

A The hole, the location?

Q The only question is, does it show the hole?

A Yes, it shows the hole in blue. It was superimposed on the drawing.

Q Superimposed from where?

A From another drawing.

Q Is that other drawing available?

A Yes, sir.

Q Who has it?

A It is in the court.

Q Is it in the court here?

A Yes, sir.

Q May we have it?

A It is shown on the drawing.

Q I didn't ask you a question. This drawing that you are now holding in your hand which was given to you by counsel, had that been marked in this court at any time, counsel?

MR. RUDOFSKY: Yes, it did.

MR. SCHWARTZ: What exhibit number?

MR. RUDOFSKY: It was part of Exhibit 9. Excuse me, part of Exhibit 11. It was one of the four blueprints.

However, generally, we have marked only one document as 11.

MR. SCHWARTZ: That is not this document.

MR. RUDOFSKY: No, it is not.

MR. SCHWARTZ: I would like to mark this one just for identification for a moment.

THE COURT: 19. We had better mark it. Let's see, 11A?

THE CLERK: Blueprint of the floor of the watch-tower marked 11A for identification.

(So marked.)

A This is a blueprint of the cross-section and also shows a plan view of the area at the catwalk and elevation.

Q Now looking at 11A for identification, could you

point out to me the hole?

A Right here. Identified as area 256 (indicating).

Q How would you describe that hole?

A It is a circle. It is not a complete circle.

Q Well, how would you describe it?

A If I was mathematically dividing it I would say it was composed --

MR. SCHWARTZ: Just a minute.

THE COURT: That is the only way you can do it.

A -- that it was an area having a radius which I know from other drawings, which I know from other drawings is twelve inches extending from an arc of approximately 300 degrees. If I may, sir, wite a pen. It has a radius of twelve inches with a circumference and arc transmitted approximately 300 degrees, and a triangular section.

THE COURT: Beginning at approximately thirty degrees at point of compass and going to approximately 330 degrees.

THE WITNESS: Okay, sir.

THE COURT: With a cord extending across the top.

Q What would you say is the length of the cord?

A I'd like to use the architect scale and scale it off.

The distance in scale is approximately fourteen inches.

Q The cord is fourteen inches?

A Yes, sir.

Q Would you say the radius is twelve inches? That diameter would be twenty-four inches?

A That is correct.

Q And the diameter would be everything except the part of the cord of twenty-four inches?

A The meaning --

Q Would you say that running from the cord --

THE COURT: From 30 degrees to 210 is twenty-four inches and 330 to 150 is twenty-four inches, yes.

No. That is at the point of the compass.

We don't have to do the mathematics here.

Q What is the distance from the center of the cord to the center of the circle?

A By the scale it is approximately eight inches.

THE COURT: So you have twenty inches from the top to the bottom of the circle, right?

THE WITNESS: Yes, sir.

Q What is this mark in the supposed hole?

A It was identified on this exhibit.

I am sorry, sir, it is on the other drawing.

MR. RUDOFSKY: This one?

THE COURT: Mark it as 11B.

THE CLERK: Exhibit so marked as 11B for identification.

(So marked.)

MR. RUDOFSKY: Your Honor, before the cross-examination continues, could your Honor inquire of Mr. Schwartz what the relevance of this line of questioning is.

A These are known as lift holes. Identified as being one by four inches with rounded edges.

THE COURT: Known as what?

THE WITNESS: Lift holes.

THE COURT: They are for the hatch cover?

THE WITNESS: Yes, sir.

Q What is the purpose of those lift holes?

A So you can lift up the manhole cover.

Q When the manhole cover is lifted up does it have to be lifted up straight?

A Sir, I'd like to state I don't believe it has been confirmed that this hatch cover was hinged, --

Q Just a moment --

MR. RUDOFSKY: Your Honor, I think he should be allowed to answer the question.

MR. SCHWARTZ: I want to take it from there.

THE COURT: Let him finish.

A If it was hinged it would go up in an arc.

MR. SCHWARTZ: He said it had not been confirmed that the cover was hinged.

Now, I am stopping him at that point.

THE COURT: Let him finish his answer. Go ahead.

That was going to be your answer?

THE WITNESS: Yes, sir.

Q What do you mean when you say that it had not been confirmed? What do you mean by that?

A There is nothing in the record that I viewed that showed a detail of a hinge connection for this tower.

MR. SCHWARTZ: That is all, Judge.

REDIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Mr. Zammit, do you know as a fact whether the --

MR. SCHWARTZ: I object to his prefacing do you know as a fact. I think it is improper.

THE COURT: Yes, do you know to your knowledge.

Q Do you know, to your knowledge, whether the cover here was actually hinged?

A No, sir.

Q Do you know to your own knowledge that it was not hinged?

MR. SCHWARTZ: I object to that.

THE COURT: Overruled.

Q Do you know whether similar towers with similar hatches are hinged or unhinged hatches?

MR. SCHWARTZ: I object to that.

THE COURT: That was asked on direct.

A No, sir.

MR. RUDOFSKY: I have no further questions.

THE COURT: What are we going to do with the blackboard drawing? I think in the light of what we have after this afternoon I may need that blackboard again, and I want to make arrangements for you to make a sketch on the yellow pad which duplicates it that you both can agree on or get somebody to take a picture of it.

MR. RUDOFSKY: I think we can agree on a sketch. Can we agree?

MR. SCHWARTZ: I will be amenable to arriving at an agreeable sketch.

THE COURT: Maybe in the next hour and a half you two can try your hand at drawing.

MR. RUDOFSKY: Your Honor, before we adjourn,

you had asked me to find the original photographs that Mr. Daniels took.

THE COURT: Were they marked?

MR. RUDOFSKY: I don't see that they were marked. I don't see photographs on that list.

THE COURT: I don't want them. Is there any doubt that these photographs were taken after the accident?

MR. RUDOFSKY: Not to my knowledge.

MR. SCHWARTZ: No, they were taken after the accident.

THE COURT: That is all I wanted to be sure of. I am talking about Exhibit 3 and 1.

MR. SCHWARTZ: Yes, Judge, after the accident.

THE COURT: Are there any other loose pieces of information that we are missing?

MR. RUDOFSKY: I don't believe so. Does your Honor want us to continue to maintain the exhibits?

THE COURT: We just have one more witness, right?

MR. RUDOFSKY: I have one more witness.

THE COURT: Maintain them and deliver all the exhibits to me in my chambers.

Gentlemen, when are you going to want to file

post-trial briefs in this case.

MR. SCHWARTZ: How much time would the Court give us?

THE COURT: Are you going to want to file findings of fact and conclusions of law?

MR. SCHWARTZ: Not unless the Judge wants it.

THE COURT: I know everything you are going to do to make life easier for me is always welcome.

It is up to you. I don't care what you do. The easiest thing is to order a record from this young lady. I don't expect you are going to do that.

MR. SCHWARTZ: Off the record.

(Discussion off the record.)

MR. RUDOFSKY: Your Honor, the defendant would like to file a brief.

THE COURT: By tomorrow?

MR. RUDOFSKY: Not by tomorrow, your Honor.

THE COURT: When?

(Discussion off the record.)

(Trial adjourned until 4:00 p.m. on this date.)

(continued next page)

MR. RUDOFSKY: Your Honor, we are prepared to proceed with the last witness. Would you like to do the housekeeping business first?

THE COURT: No, continue.

MR. RUDOFSKY: The defense calls Robert Castelli.

R O B E R T C A S T E L L I , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFSKY:

Q Where do you reside?

A West Islip, 4 Sexton Drive.

Q How long have you resided there?

A Approximately seven years.

Q Are you employed?

A Yes.

Q By whom?

A State of New York.

Q In what capacity?

A Registered Nurse.

Q Are you employed at a particular institution?

A Northeast Nassau Psychiatric Center.

Q Mr. Castelli, did there come a time when on the

24th day of June, 1972, you were present at Fire Island?

A I don't remember if that was the date, if that is the date of the incident.

Q You were at Fire Island?

A If that is the date of the incident, yes.

Q Do you recall what time you got there?

A 11:00 o'clock. I am not sure. I can't be definite on that at all.

Q Did there come a time after you arrived at Fire Island when you and Victor Behrend met some other people?

A Yes, on the beach.

Q Do you know who you met?

A Yes, sir, Debbie Barth and Alan Peers, or maybe w saw Peers first and saw the other people later. We met a group of girls on blankets.

Q Where did you first meet Alan Peers on that day?

A I don't recall.

It may have been after the beach. I don't think I went with him. I think I met him on the beach after arriving there.

Q Can you approximate where on the beach?

A At field 2 in front of the concession stand down by the main lifeguard tower. Maybe a little bit to the right facing the ocean.

Q Did there come a time when you and Victor Behrend and Alan Peers and Debbie Barth and anyone else walked toward the Coast Guard tower?

A Yes, right.

Q Could you explain to the Court who went to the Coast Guard tower?

A I guess everyone involved here. Myself and Rosalie, Debbie, another girl, Victor and Alan.

Q Did there come a time when you arrived at the tower?

A Yes.

Q Could you explain in your own words what happened from there on?

A From the time I arrived at the tower?

Q Yes.

A I can't remember if people were already on the tower but there were people on the tower after a few minutes.

Q When you say people, who are you referring to?

A Everyone except Rosalie and myself, which would mean Victor, Alan and two girls.

Q Where were you and Rosalie?

A If you are going to look at the front of the tower with the ocean behind you I would be to the right, maybe back a little bit from the tower. I am not sure how far

away I was.

Q Did you do anything in particular?

A Just sat on the beach and talked, small talk.

Q To whom?

A Rosalie.

Q She sat on the beach with you?

A We walked along. We walked to the water's edge and that type of thing.

Q After you were sitting down and while you were talking to her were you able to see what was going on in the tower?

A Yes, you could see what was going on in the tower. If you were going on the other side, then you wouldn't be able to see anything because of obstructions.

Q What, if anything, did you see?

A I didn't really notice and I didn't really examine what they were doing. I guess walking to all sides of the tower and looking.

Q Did you specifically see Debbie Barth walking around?

A I believe everyone who went up was in motion. I don't think anyone walked up and stood still.

Q Did you actually see Debbie Barth fall?

A I guess I first saw her maybe a second or two

after she was in the air.

Q I see. Now, during this period of time when you were sitting on the beach with Rosalie Rozzo, could you hear what was going on on the tower?

A Yes, I could hear just a little bit of it. I couldn't hear clearly every single word.

Q What did you hear?

A I heard laughter and general noise like laughing and kidding around type of thing. At times only when the voices were raised.

Q Did you hear any conversation or parts of conversations?

A Any particular conversations I wouldn't be able to hear.

Q Parts of conversations?

A Yes, I do recall hearing something.

Q What do you recall hearing?

A Laughter, and also I heard a comment right before the girl fell about cigarettes. Something to the extent of like somebody was in pursuit of her for a pack of cigarettes.

Q What did you hear?

A Something to the extent of "Give me my cigarette back."

Q Did you see anyone pursuing her?

A I wasn't watching. I just heard. I didn't see that happen. I just heard that kind of a sentence in that area. I didn't see that happen.

MR. RUDOFSKY: I have no further questions of this witness, your Honor.

Your Honor, if I may, I do have one further question.

Q Was there a particular reason in your own mind why you did not climb the tower?

MR. SCHWARTZ: Objection.

THE COURT: No. I will take it for whatever it is worth on the basis that I said I would take it earlier.

How old were you then?

THE WITNESS: 18, at that time. Yes, I would be 18.

THE COURT: I'll take it.

Was there a particular reason why you didn't climb?

THE WITNESS: I felt that the tower was unsafe. Personally, I felt I didn't want to go up the tower, not only because I wasn't meant to, I just didn't want to go. I didn't have a desire so I didn't go up the

tower with anyone.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q As I understand it, you were with Rosalie downstairs?

A On the ground, yes.

Q And you were walking around with Rosalie?

A Prior to sitting down we were walking around. We went down to the water's edge, the west end which would be beach. We walked around there, talked a little bit and sat down. When we sat down we stayed exactly where we were sitting down, at the place where the accident happened. We didn't move around.

Q Where you ended up was about ten to fifteen feet from the tower?

A I think I said that once before, ten to fifteen feet. I would have to think about it.

Q I am only asking you.

A At this time I don't really know howfar it was. I think I said twenty feet. It could be longer, though.

Q Just a moment. Answer my question and don't volunteer anything outside the question I am asking you.

A Okay.

Q Were you anticipating what I was about to ask you?

A No, I wasn't.

Q You were discussing your testimony with counsel a little while ago?

A When I remember reading my deposition --

Q I asked you whether you discussed your testimony with counsel a little while ago.

A Did I discuss my testimony? Of course not.

Q Did you discuss the happenings of the occurrence with counsel?

A We talked about it. I looked at my deposition again.

Q Did you state in your deposition that you were about ten to fifteen feet away from the tower?

A I stated that, and also I said twenty feet after that, ten to fifteen, possibly twenty. That is what I stated.

Q Now, when you were with Rosalie were you both engaged in conversation?

A Yes, small talk, yes, sir.

Q Isn't it a fact that when you were with Rosalie you were not facing the place where the occurrence took place?

A That is correct.

Q Isn't it a fact that the time you looked was when you heard a scream and saw her falling?

A Yes.

Q Your interest immediately before this occurrence was with Rosalie; isn't that so?

A Say that again?

Q Your interest before the occurrence took place was with Rosalie?

A Not my total interest.

Q Did I ask you whether it was your total interest?

A You asked me what my interest was.

THE COURT: Wait a minute. You have answered. Please use the podium as I have asked you to before, Mr. Schwartz. Please use the podium and face the witness when you address him.

A No.

THE COURT: I am not going to tell you again.

Q What were you and Rosalie talking about?

A I have no idea.

Q When you were talking wite Rosalie were you interested in what she was saying?

A Yes.

Q Did you want her to be interested in what you were saying?

A I imagine I did, yes.

Q Were you interested in seeing her again?

A No.

Q I believe you said you went there with Mr. Victor Behrend.

A Right.

Q Is he a friend of yours?

A At that time we were associates. We hung out together.

Q After Debbie fell, did Victor Behrend come down?

A After she fell, everybody came down.

Q Did Victor Behrend come down?

A Yes, he did. I don't know if he was first or not.

Q What?

A Everybody came down as quickly as possible.

Q Did you speak to him after he came down?

A Victor Behrend?

Q Yes.

A I don't know if I spoke to him directly. I may have said something like --

Q The question is did you speak with him?

A I don't remember.

Q Did he speak with you?

A I don't remember.

Q Outside of not remembering whether he you, did you hear him talking?

A I don't remember.

Q Wasn't it the real reason you didn't go up on the tower because you wanted to be with Rosalie?

A That's nonsense.

Q Do you know which direction the hole faces?

A The hole faces the ocean which I imagine would be south or southwest.

THE COURT: Generally speaking, south.

THE WITNESS: Generally speaking, south.

Q Were you opposite the hole?

A That would mean I would have to be sitting in front of the hole. The hole was to my left.

Q Now, you stated before you believe everybody was in motion because that is what they went up to do; is that a fact?

A I don't believe I said that.

Q What did you say?

A I believe you want to look, you want to observe. I feel they went to every direction to look. I don't think they went up and stood still. They probably walked around at least once.

Q That is what you believe?

A I believe that, yes.

Q But you didn't see that?

A I might have, but I am going to say I don't recall seeing that.

Q Do you remember Alan Peers coming down?

A Yes, I remember every member coming down.

Q Before everybody came down, before the occurrence Alan Peers coming down?

A No, I don't remember him coming down and going back up again.

Q Yes?

A I don't remember that. I don't recall that.

Q Do you remember him asking you for a cigarette?

A He might have.

At the tower?

Q At the tower before the occurrence.

A I don't recall. He might have. I don't smoke. I didn't have any cigarettes. I don't recall. He might have asked me.

Q Did you know Alan Peers prior to that day?

A Not really. I might have heard his name through school or through the neighborhood but I didn't know him.

MR. RUDOFSKY: Your Honor, may I inquire if Mr. Schwartz is attempting to make this his own witness?

THE COURT: No, I think it is perfectly proper

cross-examination.

Q So you never met him before that day?

A No, not formally. I never met him before that day.

Q You mean there is a difference between meeting a person formally and informally?

A There certainly is, I might have seen him at a party or at school but never met him. And he was never my friend prior tc that day. I could have seen him anywhere.

Q And that is what you meant by not meeting him formally?

A Exactly.

Q You were the oldest person in that crowd at that time?

MR. RUDOFSKY: Object, your Honor. How is the witness supposed to know?

THE COURT: Do you know if you were the oldest?

Q My question was were you the oldest person in that crowd at that time?

A How do I know?

Q You are asking me a question?

A I am answering by saying I don't know.

Q That isn't what you said.

A Okay.

Q Had you been to this area before?

A What area?

Q Where the occurrence took place, the tower.

A I had never been that close to it before. I have seen it from a distance but had never really been to the base that I can recall.

Q How far away would you say you were from the tower at the other occasion?

A Are you asking me that question right now? Tell you how far I was away from the tower?

I'd say thirty feet, twenty to thirty feet.

MR. RUDOFSKY: Your Honor --

THE COURT: He is asking you on the last occasion prior to the incident when you looked at the tower, how far away were you?

THE WITNESS: Do you mean the first time I ever saw the tower in my life?

Q I asked you if you had ever been at this tower before.

A And I said no, never at the base of the tower. I have seen it from the bay.

THE COURT: How far away were you when you observed the tower the time before you observed it on this occasion?

THE WITNESS: Probably from the oceanfront when you walk to Democrat Point, the tower is way off in the distance. It possibly can be seen from Robert Moses Beach. It might be seen from bay front.

MR. RUDOFSKY: I ask that the witness' response from 20 to 30 feet be stricken.

A I am unsure, to be honest with you. I am not sure of how far away I was from the tower.

Q I am talking about the time when you say you were the closest.

A A mile, two miles, three miles, five miles.

Q That is the closest you ever were to the tower?

A The closest prior to the incident was probably a little bit less than a mile. I have been to Democrat Point many times which is about a little less than a mile, in my opinion, from the tower.

Q Did you say you lived in the area?

A Sexton Drive, West Islip. It is on the South Shore near the Robert Moses Bridge.

Q How long did you live there before the occurrence?

A I don't really know. I never kept track of that. I believe I moved there in -- I don't remember what year I moved there -- I can't even say, maybe somewhere about five

years. I would say at the time of the incident maybe five years I had lived there in West Islip. I don't recall.

MR. SCHWARTZ: That is all at this time of this witness.

MR. RUDOFSKY: We will excuse the witness, your Honor.

Thank you, sir.

THE COURT: The Government rests?

MR. RUDOFSKY: The Government rests, your Honor.

MR. SCHWARTZ: I'd like to call Alan Peers in rebuttal.

A L A N P E E R S , called as a witness, having previously been duly sworn, resumed the stand and testified in rebuttal as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Peers, do you know the previous witness, Bob Castelli?

A I met him on the beach that day for the first time.

Q He was one of the men at the beach?

A Yes, sir.

Q Now, you stated before that you went downstairs for a cigarette. Was Bob Castelli one of the men you asked for a cigarette?

A I think he was. I went down to two people down there which was Bob and Rosalie and I asked them.

MR. RUDOFSKY: Your Honor, may I inquire? Nobody said he didn't. The witness said he couldn't remember.

THE COURT: Go ahead.

Q Now, before you came to this area of the tower, were you in the presence of Bob Castelli?

A Yes, I was.

Q And together with Victor?

A Yes, sir.

Q About how long would you say you were in their presence that day up to the time you reached the tower?

A Two hours, two and a half hours.

Q During that time did you notice whether Bob Castelli smoked a cigarette?

A I don't remember if he did or not. I really couldn't say.

MR. RUDOFSKY: Your Honor, again, what is being rebutted? Did he make an offer?

THE COURT: There is enough.

MR. SCHWARTZ: I only want to get the answer. I didn't hear it.

THE COURT: "I don't remember. I really couldn't say."

MR. SCHWARTZ: That is all.

MR. RUDOFSKY: I have no cross.

THE COURTG You may step down.

The Plaintiff rests?

MR. SCHWARTZ: No, there is something.

May we turn this around?

THE COURT: Have you made maps of this thing?

Go ahead, turn it around.

MR. RUDOFSKY: Off the record.

(Discussion off the record.)

MR. SCHWARTZ: If the Court will recall, the witness Zammit had placed the --

THE COURT: This is just argument, counsel.

Are you going to argue something, counsel?

What are you doing, testifying?

Are you going to call another witness?

MR. SCHWARTZ: I want to point out something that will be an exhibit for the Court.

THE COURT: Go ahead.

MR. SCHWARTZ: This lower yellow mark was the mark made by Mr. Zammit so I want it clear since we have Victor Behrend up at the top that there be a notation that this was --

THE COURT: I remember who marked what. Do you want to note it on here?

MR. SCHWARTZ: I am worried if it goes on appeal.

THE COURT: You want me to note on here the ink notations were Mr. Zammit's?

MR. SCHWARTZ: And he indicated this was the opening, the hole.

THE COURT: I will remember what he said and I will mark blue ink equals Zammit and red ink equals Behrend, okay?

MR. SCHWARTZ: Yes, sir.

MR. RUDOFSKY: Are those going to be court's exhibits?

THE COURT: Court's Exhibit 1, 2, 3.

Court Exhibit 1 was Debbie Barth's, Gallagher is Exhibit 2 and Court Exhibit 3 will be Behrend.

THE CLERK: Court Exhibits 1, 2, 3 marked in evidence.

(So marked.)

THE COURT: Exchange briefs.

MR. RUDOFSKY: We are going to order the transcript and it is going to be delivered next week and we have not been able to agree on a date for exchanging the briefs.

Mr. Schwartz says it would be best for him by the end of October. I would personally suggest to the Court that the brief could be ready two weeks after the transcript is delivered. I realize he has problems with that but I do think much more time than that would be uncalled for.

THE COURT: Mr. Schwartz, you really have to do better than the end of October. I just can't do that. I think I'd better have everything including findings of fact and conclusions of law by

September 18th.

MR. SCHWARTZ: September?

THE COURT: September 18th.

You have a pretty good brief already written. If you have anything additional say it. I have your original argument. If you have anything additional say it. Do not give me a lot of duplicate stuff. I don't have to read something twice.

MR. SCHWARTZ: If your Honor pleases, you know when we have holidays coming in and when we have to get the brief it will be about a week. Have to be typed up --

THE COURT: I will give you the 25th for the brief and proposed findings of fact. Okay?

Have a good Labor Day.

MR. RUDOFSKY: Your Honor, do you want the exhibits now?

THE COURT: Deliver them to my chambers.

(Whereupon, the trial ended at 4:45 p.m.)

* * *

OPINION AND ORDER BY PLATT, D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH, and WILLIAM BARTH, individually,

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

- -x

74 C 74

OPINION and ORDER

November 11, 1975

PLATT, D.J.

Plaintiff, individually and as parent and natural guardian of his daughter, Deborah, sues for expenses incurred, for loss of her services and for her personal injuries sustained on her fall from a U.S. Coast Guard tower located on Fire Island, Suffolk County, New York, on June 24, 1972.

Jurisdiction, which is not disputed, is obtained under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, et seq. The parties agreed that the issue of liability should be tried first and separately by the Court.

In the pretrial order counsel for the litigants stipulated to the following uncontested facts:

1. The accident occurred on June 24, 1972 sometime between 12 noon and 3 p.m.

2. The accident occurred on Democrat Point, Fire Island, New York.

3. Deborah Barth, Allan Peers, Eileen Gallagher and Victor Behrend climbed the tower.

4. Robert Castelli and Rosalie Razzo remained on the beach.

5. Deborah Barth fell through an opening in the outer perimeter of the tower.

6. The infant plaintiff sustained serious injuries.

7. At the time of the occurrence, and at all times prior thereto from 1967, the U.S. Coast Guard owned and maintained the tower involved herein.

8. Condition of involved tower:

    1. No fence around base.
    2. Steps from beach to base removed.
    3. Trap door from main steps to watchhouse missing.
    4. Hatchcover for escape hatch missing.

9. The tower was 65' high from the ground to its highest point.

The plaintiff called Deborah Barth who testified that at the time of the accident she was fourteen years of age having been born on February 2, 1958, and that she was going into the 9th grade at the Beach Street Junior High School in West Islip this Fall.

Miss Barth said that she arrived at the Robert Moses State Park beach at approximately 10:00 AM on June 24th and that in the early afternoon she and two of her friends, Eileen Gallagher and Rosalie Razzo, walked to the U.S. Coast Guard tower located at or near the Westerly end of the beach. As she and Miss Gallagher climbed up the tower they were joined and followed by Messrs. Allan Peers and Victor Behrend.

There were two cement blocks, one on top of the other, forming a base for the tower over and on top of which Miss Barth said she hoisted herself obtaining some assistance from a small black pipe jutting a small distance out from the

lower of such two blocks. Thereafter, Miss Barth, Miss Gallagher and Messrs. Peers and Behrend, ascended the ladders within the open-framed tower to a square hatch located in the floor of a partly enclosed square room at the top of the tower.

The enclosure for such room was a four foot high wall on the outside of which was a three foot wide "catwalk" which completely surrounded the inner room. On the outside of such catwalk was a "waist high" railing.

Miss Barth testified that she did not see any signs of any kind at the base or on any part of the tower.

On cross-examination Miss Barth said that she just glanced at the tower as she approached it; she did not look up at the tower when she arrived at the base thereof or before she started to climb; she did not look up at the portion of the tower above her as she was climbing and that she never looked up to see where she was going. She admitted that she was well aware of the height of the tower and the danger thereof and the fact that she might hurt herself.

According to Miss Barth, when she arrived at the enclosed room at the top of the tower she looked at the view, moved to her right, climbed over the wall to the catwalk, looked out at the water, moved over to her right with her hands out on the railing still looking at the view and then took a step back, turned to her right, and as she went to take another step

she fell through an escape hatch (the ladder of which led straight down to an upper level of the tower at which access was available to the main ladder in the center of the tower). Miss Barth, however, fell past such ladder and all the way to the sand on the beach located some 50 feet below.

Miss Barth testified that she had never been up on the tower before, had not walked around the entire catwalk before her fall, did not see the escape hatch before the fall and did not know there was an escape hatch there.

Miss Barth further testified that she did not know or could not recall where Eileen Gallagher, Victor Behrend or Allan Peers were located at the top of the tower when she went over the wall onto the catwalk and thereafter. She said that she did not remember any laughter, any person running at any time or any conversation about cigarettes.

Plaintiff's only other witness was Allan Peers who conceded that he had declared his love for the plaintiff and admitted that he cared for her. He testified that he had been up the tower some 200 times since 1961 when he was five years of age and that the escape hatch in the catwalk had always been open since that time. He said that two to three weeks before June 24, 1972 he had been up the tower and had seen the open escape hatch at that time and that he could not remember ever seeing any signs on the tower during the entire period from 1961 through 1972.

Mr. Peers testified further that he had seen children climbing on the tower since 1961.

On the day in question he said that he climbed up to the top of the tower, looked around, asked Mr. Behrend if he had any cigarettes, went down to the beach to attempt to obtain cigarettes and was unsuccessful, went back up the tower and saw Miss Barth standing by the rail at the southeast corner thereof. He said she turned around and faced west and then took a step and fell through the escape hatch.

On cross-examination Mr. Peers admitted that he made these observations just as he emerged through the floor in the enclosed room on the main ladder.

The government's proof, however, showed that a person climbing the main ladder through the main hatch would be facing north or 180 degrees away from the escape hatch in the catwalk.

The government's proof also showed that the tower was not erected until June of 1965 and that Coast Guard watches apparently were maintained through 1966. Lieutenant Commander Aliff of the U.S. Coast Guard testified that during the period from 1968 through 1972 he caused "No Trespassing", "U.S. Property" signs to be placed around the base of the tower and replaced as often as they were found to be missing. His estimate was that such replacements occurred about every three or four months. He conceded, however, that since 1968 the tower had not been

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in operation or used for any purpose, that nobody was assigned to maintain it and that he did not cause any inspections to be made of the tower. At the same time he pointed out that there was a light and radio beacon on the breakwater at the westerly end of the beach which was maintained by the Coast Guard and personnel assigned to do so checked the tower on their way to and from their inspections and maintenance of such beacon.

The government called all of the other witnesses to the accident, namely: Eileen Gallagher, Victor Behrend, Rosalie Razzo and Robert Castelli, and their testimony established the following facts:

1. The main hatch was in the northeast corner of the enclosed room (Gallagher and Behrend)(Miss Barth had placed the same in the southeast corner);

2. The escape hatch was on the south side of the tower (Gallagher and Behrend) (Miss Barth had placed the same on the west side);

3. Miss Barth was walking straight ahead and looking to the right and was laughing, fooling around and talking to Mr. Peers immediately prior to the accident (Gallagher) or Miss Barth had taken a cigarette from Mr. Peers and started to run and might have been talking to Mr. Peers as she ran along the catwalk immediately prior to the accident (Behrend).

4. Just prior to the description given in paragraph 3 above, Mr. Behrend and Miss Barth were standing on the northeast corner of the catwalk and Mr. Peers was standing on the northeast corner of the room leaning against the wall

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and facing the catwalk.

5. Miss Barth was running immediately before the fall (Razzo), they were laughing just before the fall (Razzo and Castelli) and one of them made a comment about cigarettes to to the effect "give me my cigarettes back" (Castelli).

In their pretrial order the parties state that the contested facts are 1) the existence of warning signs and 2) the behavior of the plaintiff after climbing steps to the watchtower.

The Court has no difficulty in finding that there were no warning signs at or near the tower on June 24, 1972 but at the same time the proof showed and the Court finds that the defendant placed and replaced No Trespassing and Government Property signs whenever it learned that prior placed signs had been removed which was estimated to be every three or four months.

With respect to the behavior of the plaintiff after climbing the steps to the watchtower, the Court feels that the sympathies and interests of the witnesses Gallagher, Razzo, Behrend and Castelli lay definitely with Miss Barth but nonetheless each of them related a consistent description of her conduct which was far different from that related by Miss Barth and her close friend, Mr. Peers. Under the circumstances, the Court must credit the testimony of the government's witnesses and find that:

1. The main hatch was located in the northeast corner of the square room.

2. The escape hatch was located on the south side about four feet from the southeast corner of the catwalk.

3. Moments before the accident Mr. Behrend and Miss Barth were standing near the northeast corner on the east side of the catwalk and Mr. Peers was standing on the northeast corner of the square room facing the catwalk.

4. Miss Barth took a cigarette from Mr. Peers and started to run in a westerly direction along the southerly catwalk, looking over her shoulder to the right, and there was laughter and fooling and kidding around and someone (probably Mr. Peers) said "give me my cigarettes back", and Miss Barth, continuing in such fashion, ran around the southeasterly corner and stepped through the escape hatch and fell to the sand below.

The government showed that a hatch cover had been designed and presumably installed for the escape hatch and there was no proof with respect to when the same was removed from the tower. Such proof, as there was, indicated that the escape hatch hole had always been open. The proof also indicated, however, that the main hatch hole had also always been open.

Plaintiff appears to contend that defendant's negligence lay in (i) failure to fence off the tower, (ii) failure to post the tower with adequate warning signs, (iii) inadequate

inspection, and (iv) leaving the escape hatch open and unguarded.

Plaintiff also seems to contend that the tower constituted an attractive nuisance and the escape hatch was a dangerous condition thereon.

The government clearly appears to have been negligent in leaving the escape hatch open and unguarded and in failing to inspect and maintain the tower. Regular inspections would have revealed the missing hatch cover or that the same was open and unguarded. They would undoubtedly also have disclosed the children and others who were climbing the tower to enjoy the view.

The same is true with respect to the main hatch. If both had been closed and locked, while all dangers might not have been eliminated, the traffic undoubtedly would have been substantially reduced and this particular accident would, of course, not have occurred.

Nonetheless, and despite this Court's sympathy for Miss Barth's plight after the accident, the fact remains that the proof with respect to her contributory negligence is overwhelming and cannot be ignored.

In the first place, the escape hatch in the catwalk was clearly visible to anyone on the beach and anyone ascending the tower. By her own admission plaintiff never looked up at the tower either before or at any time during her ascent.

Secondly, Miss Barth must have been aware that the tower was not comparable to the New York State exhibit at the Worlds Fair grounds or the Empire State Building in that

they (but not it) were open to and maintained for the general public. The steps providing access to the ladder on the tower had been removed and it was necessary to climb or to vault up and over two substantial cement blocks before one could climb the main ladder on the tower.

Moreover, the tower itself was located approximately a mile away from the main beach and swimming area and the pavilion where the only lifeguards and other personnel were stationed.

Thirdly, Miss Barth herself conceded that she was well aware of the height of the tower and the dangers thereof and the fact that she might hurt herself.

Fourthly, notwithstanding the foregoing Miss Barth took no precautions to guard against such obvious and known dangers and risks. As indicated, she did not look up before or during her climb and she made no inspection of the so-called catwalk area after she attained her goal and before climbing over the inner protective wall; and

Fifthly, and perhaps most significantly, plaintiff proceeded to "horse around" on the catwalk, took a cigarette from one of her male companions, ran down the catwalk, turned the corner and fell through the escape hatch, all while looking over her right shoulder at her friend from whom she had taken the cigarette.

It is easy enough to speculate that the accident would have happened anyway because the escape hatch was a "trap" but the fact is that it did not happen because of that fact but rather because of the negligence of Miss Barth. Moreover, there was no proof of any prior similar accident.

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Furthermore, the proof showed that the hatch had a specific purpose, namely, it was designed as an escape hatch to which there was connected an escape ladder. And Miss Barth might just as well have fallen through the main hatch had she been "horsing around" in the center part of the tower.

The only factor bearing on the contributory negligence question that remains for this Court to consider is the question of Miss Barth's capacity to be contributorily negligent. In New York, the rule of contributory negligence applies to an infant as it does to an adult unless the child is incapable of exercising judgment. This Court has no difficulty in reaching the conclusion that Miss Barth must, under the circumstances of this case, be considered sui juris, i.e., capable of acts of contributory negligence. 3 Warren's, Negligence in the New York Courts, Sec. 4.04, 4.09[7], [8], pp. 124-25, 145-46.

Under the holding of Gloshinsky v. Bergen Milk Transportation Co., 279 N.Y. 54 (1938), an infant is required to exercise reasonable care to avoid known dangers, and all unknown dangers which ordinary care requires him or her to anticipate. The care required is that "which an ordinarily prudent person of his age, capacity and experience would have exercised under similar circumstances." 279 N.Y. at 58; see also e.g., Jacobs v. Koehler Sporting Goods Co., 208 N.Y. 416 (1913); Rodford v. Sample, 30 App. Div. 2d 588 (3d Dept. 1968). The burden of establishing the infant's freedom from contributory negligence rests with the plaintiff, Gloshinsky v. Bergen Milk Transportation Co., supra; Camardo v. New York State Railways, 247 N.Y. 111 (1928).

Here, the plaintiff has not met his burden. He has not shown that his fourteen-year old daughter was "of such tender years that [she lacked] the experience which would enable [her] to realize the presence of a threatening danger, and the judgment which would enable [her] to avoid the danger." Camardo v. New York State Railways, supra, at 115-16. Indeed, the Court is satisfied from the evidence that plaintiff's daughter fully comprehended the danger inherent in play on a high tower. She nevertheless failed to exercise the care which is to be expected of one of her age, capacity and experience. Instead, she climbed the tower, did so without carefully examining it, and carelessly ran and played while atop it. This contributory negligence was clearly a proximate cause of her tragic accident. Since an action by a parent for injuries to a child is derivative, the daughter's contributory negligence will bar recovery by her father, Tidd v. Skinner, 225 N.Y. 422 (1919); Barash v. KLM Royal Dutch Airlines, 315 F.Supp. 389 (E.D.N.Y. 1970); Reilly v. Rawleigh, 245 App.Div. 190 (4th Dept. 1935); McNally v. Addis, 65 Misc. 2d 204, 225 (Sup.Ct. Westchester Co. 1970).

It follows from the discussion above that judgment must be entered for the defendant, the United States of America. The preceding shall comprise the Court's findings of fact and law.

SO ORDERED.

U.S.D.J.

JUDGMENT AND ORDER DISMISSING COMPLAINT, APPEALED FROM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
DEC 10 1975
TIME A.M.
P.M.

WILLIAM BARTH as parent and natural guardian of the infant DEBORAH BARTH and WILLIAM BARTH, individually,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

74 C 74

An opinion and order, containing findings of fact and law, of the Honorable Thomas C. Platt, United States District Judge, having been filed on November 11, 1975, the parties having agreed that the issue of liability should be tried first and separately by the Court, and the Court having determined that the plaintiff has not met his burden that the government is liable, and directing that judgment be entered for the defendant, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant and that the complaint is dismissed.

Dated: Brooklyn, NewYork
December 10, 1975

Lewis Orgel
Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

WILLIAM BARTH as parent and natural guardian of the infant, DEBORAH BARTH, and WILLIAM BARTH, individually,

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

----------x

NOTICE OF APPEAL

74 C 74

Notice is hereby given that William Barth as parent and natural guardian of the infant Deborah Barth, and William Barth individually, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment and order dismissing the plaintiff's complaint and entering judgment for the defendant, and from every part of said judgment and order, entered in this action on the ~~11th~~ 10th day of ~~November~~ December, 1975.

Dated: New York, New York
December 9, 1975

Yours, etc.

HARRY H. LIPSIG, P.C.
Atty. for Plaintiffs
100 Church Street
New York, New York 10007

TO: EDWARD S. RUDOFSKY
United States Atty.
Eastern District of NY
Brooklyn, New York

Services of three (3) copies of
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Attorney for

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